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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court	5
2. The decision of the Court of Appeals is erroneous	9
a. The relevant statutes	9
b. The legislative history	10
c. The prior air-mail legislation	13
d. The subsequent air-mail legislation	21
e. Administrative construction of the air-mail statutes	23
f. The priorities allegedly accorded air-mail	24
g. The Congress has not ratified the operation in question	28
Conclusion	29
Appendix A	31
Appendix B	37
Appendix C	51

CITATIONS

Cases:

Atchison, Topeka & Santa Fe Ry. Co. et al v. *Summerfield*, 128 F. Supp. 266	2
Baltimore & O. R. Co. v. *Chicago River & Indiana R. Co.*, 170 F.2d 654, 658 (C.A. 7)	21
Beach v. *United States*, 226 U.S. 243	14
Brewster v. *Gage*, 280 U.S. 327, 337	12
Brooks v. *Dewar*, 313 U.S. 354	29
Crawford v. *Burke*, 195 U.S. 176, 190	12
Employees v. *Westinghouse Corp.*, 348 U.S. 437, 444	10
Exhibit Supply Co. v. *Ace Corp.*, 315 U.S. 126, 128	8
Fleming v. *Mohawk Co.*, 331 U.S. 111	29
Gemsco, Inc. v. *Walling*, 324 U.S. 244, 260	10
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439, 456-457	12
Muncie Gear Co. v. *Outboard Co.*, 315 U.S. 759, 766	8
Schriber Co. v. *Cleveland Trust Co.*, 305 U.S. 47, 50	8
Scientific Mfg. Co. v. *Walker*, 40 F. Supp. 465 (M.D. Pa.)	8
Sturges v. *Crowinshield*, 4 Wheat. 122, 202-203	10
United States v. *Dickerson*, 310 U.S. 554, 561	12
United States v. *Yuginovitch*, 256 U.S. 450	12

Statutes:

	Page
43 Stat. 805, 39 U.S.C. 462	2, 10, 14, 15
46 Stat. 259	2, 14
48 Stat. 933, 39 U.S.C. 469	2, 10, 14, 15, 16, 17, 18
49 Stat. 744	19
52 Stat. 219	22
52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.*	2, 15, 22
52 Stat. 979, 49 U.S.C. 401(23)	15
52 Stat. 980, 49 U.S.C. 402	15
52 Stat. 994, 49 U.S.C. 485(g) and (k)	15, 16, 17
54 Stat. 899, 49 U.S.C. preceding sec. 1	2, 7
54 Stat. 1175, 39 U.S.C. 488a	2, 20
60 Stat. 243, 5 U.S.C. 1009	4
60 Stat. 1062, 39 U.S.C. 462a	2, 9, 10, 11, 12, 13, 15, 21, 25
62 Stat. 1261, 39 U.S.C. 463a	2, 9, 10
62 Stat. 1097, 39 U.S.C. 475	2, 22
63 Stat. 680, 39 U.S.C. 470	2, 23
68 Stat. 148	29
28 U.S.C. 1254(1)	2
28 U.S.C. 1331	4
28 U.S.C. 1332(a)(1)	4
28 U.S.C. 1339	4
28 U.S.C. 1391(b)	8
28 U.S.C. 2201	4
39 U.S.C. 164-169a	28
39 U.S.C. 246f	28
39 U.S.C. 276d	28
39 U.S.C. 292a(f)	28
39 U.S.C. 481-483	15
39 U.S.C. 522-579	3
11 D. C. Code 306	4

Reports:

S. Rept. No. 373, 83rd Cong., 1st Sess.	28
S. Rept. No. 574, 73rd Cong., 2nd Sess.	14
S. Rept. No. 1834, 79th Cong., 2nd Sess.	12, 28
H. Rept. No. 416, 83rd Cong., 1st Sess.	28
H. Rept. No. 563, 81st Cong., 1st Sess.	23
H. Rept. No. 911, 75th Cong., 1st Sess.	18
H. Rept. No. 1252, 83rd Cong., 2nd Sess.	28
H. Rept. No. 1428, 73rd Cong., 2nd Sess.	14
H. Rept. No. 1754, 73rd Cong., 2nd Sess.	14
H. Rept. No. 1986, 79th Cong., 2nd Sess.	13
H. Rept. No. 2163, 80th Cong., 2nd Sess.	22
H. Rept. No. 2358, 80th Cong., 2nd Sess.	28
H. Rept. No. 2619, 83rd Cong., 1st Sess.	28
H. Rept. No. 2736, 76th Cong., 3rd Sess.	19

Hearings:

	Page
Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, 75th Cong., 3rd Sess.	18
Hearings on S. 3760 before Senate Committee on Commerce, 75th Cong., 3rd Sess.	18
Hearings on Post Office Dept. Appropriations for fiscal 1956 before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess.	5, 6
Hearings on Post Office Dept. Appropriations for fiscal 1956 before Subcommittee of Senate Committee on Appropriations, 84th Cong., 1st Sess.	6
Hearings on H.R. 5560 before Senate Committee on Post Offices and Post Roads, 79th Cong., 2nd Sess.	13
Hearings on H.R. 9500 before House Committee on Post Offices and Post Roads, 71st Cong., 2nd Sess.	14

Miscellaneous:

39 C.F.R. 34.88(b)(2) (1949 ed.)	24
39 C.F.R. 34.89(a) (1949 ed.)	24
S. 2, 75th Cong.	17
S. 3760, 75th Cong.	18
H.R. 5234, 75th Cong.	17
H.R. 7273, 75th Cong.	18
H.R. 9738, 75th Cong.	18
66 Cong. Rec. 751	14
86 Cong. Rec. 9680	20
No. A-74912, 15 Comp. Gen. 1025	14
Surface Mail by Air Exemptions, Doc. 6882, 6905, 6940 (decided May 2, 1955)	27
Post Office Department Press Release No. 229, dated October 6, 1955	27
U.S. Official Postal Guide, dated July, 1953	24

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Petitioners,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 12, 1955.

Opinions Below

The opinion of the Court of Appeals, unreported at this time, is set forth in Appendix B to this petition. The opinion of the District Court granting petitioners' motion for

summary judgment, reported at 128 F. Supp. 266, may be found at pages 2-15 of the Joint Appendix. The opinion of the District Court denying petitioners' motion for a preliminary injunction, unreported, may be found at pages 70-71 of the Joint Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals, set forth in Appendix C, was dated and entered on December 12, 1955. A petition for rehearing and, in the alternative, for rehearing *en banc* was denied in orders dated January 27, 1956.

Question Presented

Is the Postmaster General, in transporting by air first-class mail bearing only three-cents postage, acting beyond the scope of his authority and in violation of the postal statutes which require that "all mailable matter being transported as mail by air" bear postage at the rate of "6 cents for each ounce or fraction thereof?"

Statutes Involved

The pertinent statutory provisions are set forth in Appendix A to this petition. They include: 43 Stat. 805; 46 Stat. 259; 48 Stat. 933; 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.* (1952 ed.); 54 Stat. 899, 49 U.S.C. preceding section 1 (1952 ed.); 54 Stat. 1175, 39 U.S.C. 488a (1952 ed.); 60 Stat. 1062, 39 U.S.C. 462a (1952 ed.); 62 Stat. 1261, 39 U.S.C. 463a (1952 ed.); 62 Stat. 1097, 39 U.S.C. 475 (1952 ed.); 63 Stat. 680, 39 U.S.C. 470 (1952 ed.).

Statement of the Case

Petitioners are common carriers by railroad operating primarily in the western part of the United States. They are engaged in the transportation of the mail. The laws

relating to the railway postal service, 39 U.S.C. 522-579 (1952 ed.), compel them to accept any mail tendered by the Postmaster General and to provide all facilities and services necessary for its safe and expeditious movement. In consequence of these obligations imposed upon them, petitioners have invested large amounts in essential facilities for the mail service. For example, one of the petitioners, the Southern Pacific Company, has invested $25,000,000 in such facilities. (J.A. 22.)

For many years, the great bulk of ordinary first-class mail has been transported between post offices by rail. At the same time, air transportation has been used exclusively for the transportation of air mail, with the exception of a few situations where, for one reason or another, surface transportation is inadequate or unavailable and the Congress has specifically authorized air transportation of ordinary mail. Commencing in early October of 1953, however, respondent, without obtaining statutory authority from the Congress, instituted what he has described as an experimental operation in the transportation of first-class mail by air between several large metropolitan centers in the eastern and southeastern parts of the United States. (J.A. 48-50.) This so-called experimental program has continued now for over two years and has been progressively expanded to embrace transportation of first-class mail by air between numerous cities in other sections of the country. (J.A. 50-51.) Under the conditions prescribed by the Postmaster General for the operation of the experimental program, the air carriers enter the program on a voluntary basis and need to accept the mail for transportation only if they have available space remaining after satisfying other traffic demands. (J.A. 52-53.) But, in fact, there is never a lack of space. (See pp. 26-27, *infra*.)

On October 6, 1954, respondent filed a petition with the Civil Aeronautics Board requesting the Board to establish

a rate for the transportation of first-class mail by air carriers on a space-available basis between numerous points in the western part of the United States served by petitioners. (J.A. 51-52.) A temporary rate, subject to retroactive adjustment upon determination of the proper permanent rate, was set by the Board and the experimental program on the West Coast was instituted on November 22, 1954. (J.A. 52.) The program continues today under the temporary rate.

Petitioners, on November 20, 1954, filed a complaint in the District Court for the District of Columbia, requesting a declaratory judgment that respondent is without authority to transport first-class mail by air and preliminary and permanent injunctions enjoining the institution or continuance of the west-coast experimental program. The jurisdiction of the District Court was rested upon 28 U.S.C. 1339, 1331, and 1332(a)(1) (1952 ed.), and upon 11 D. C. Code 306, in each case supplemented by 28 U.S.C. 2201 (1952 ed.) and section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 (1952 ed.).

A preliminary injunction was denied by the District Court, and both sides moved for summary judgment on the basis of the pleadings and affidavits on file. The District Court found and declared that it is beyond the scope of respondent's authority to arrange for the transportation by air of any mailable matter that does not bear air-mail postage, except for experimental purposes for a period not "unduly prolonged." That court also found that petitioners have standing to sue, but failed to show that they were irreparably injured "at the moment" as a result of the operations complained of. Accordingly, the District Court granted petitioners' motion for summary judgment and entered a declaratory judgment, denied respondent's motion for summary judgment, and denied petitioners' request for a permanent injunction. (J.A. 1-2.) Both petitioners and

respondent appealed from this order. The Court of Appeals concluded that petitioners have standing to bring this suit, but that respondent has authority to arrange for air transportation of ordinary first-class mail. Consequently, the Court of Appeals ordered that the judgment of the District Court be vacated and the case remanded with instructions to grant respondent's motion for summary judgment. Judge Bastian concurred only in the result.

Reasons for Granting the Writ

1. *The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.* This case presents a novel question concerning the interpretation of federal statutes having great importance to the transportation industry, the Federal Government, and the general public. The decision will have far-reaching consequences affecting the financial well-being of large segments of the transportation industry and the operation of the postal system.

The present relatively-limited experimental programs for the transportation of three-cent mail by air have resulted in substantial revenue losses to the railroads with resultant gains to the airlines. According to testimony given in February of 1955 by the Postmaster General, approximately four million pieces of first-class mail were being transported by air daily at that time, and about $2,000,000 was paid to the airlines in 1954 alone for the transportation of such mail.[1] The loss in mail revenues to petitioners from the services already discontinued as a result of the inauguration of the west-coast program amounts to more than

[1] Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st Sess. pp. 51, 73. During the four-week period following the inauguration of the west-coast program, a total of 1,555,508 pounds of first-class mail was transported by air between the west-coast cities involved. *Id.*, at p. 160.

$850,000 annually (J.A. 24, 32, 35, 36, 39), and the revenue loss to all the railroads affected by these experimental programs is, of course, much larger.

Furthermore, under the opinion of the Court of Appeals, there is nothing to prevent the Postmaster General from henceforth transporting all first-class mail, and, indeed, all other classes of mail, by air on a permanent basis. The railroads, therefore, are faced with the threat of a potential loss of some substantial part of revenues amounting to more than $300,000,000 a year.[2] And, the railroads are also threatened with the loss of a substantial part of their huge investment in facilities for the transportation of mail.

The continued operation of these experimental programs has, moreover, given rise to a practical problem of considerable significance to the railroads. They remain obligated to maintain in stand-by readiness all the facilities and services that may be required to move the first-class mail now being carried by the airlines, should either the Postmaster General or the airlines decide that, for any reason, the present arrangements are unsatisfactory. On the other hand, so long as it remains completely uncertain what percentage of the mail is to be diverted to the airlines and what, if any, limitations must be observed in that connection, it is impossible to justify making the investments necessary to maintain and replace the facilities required of the railroads for the transportation of the mail.

The great bulk of mail transported by rail is carried in passenger trains. (J.A. 22, 39.) As this Court is well aware, passenger-train service has operated under increasingly severe economic handicaps. The maintenance of an adequate system for the transportation of pas-

[2] See, e.g., the railway mail pay estimates submitted to the Appropriations subcommittees for fiscal 1956. Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st Sess., p. 161; Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the Senate Committee on Appropriations, 84th Cong., 1st Sess., p. 62.

sengers by rail is one of the most vexing problems facing the nation's transportation industry, and is of great importance not only to the citizens that utilize that service, but also to the national defense. Rail service is extensively utilized for the movements of troops and the passenger-train service has been among our most vital assets in times of grave national emergencies. The material reduction in passenger-train revenues resulting from a shift of three-cent mail transportation to the airlines must ultimately result in the discontinuance of many passenger trains now in operation. (J.A. 22-23, 25, 33, 41.)

The consequence, if we are right on the merits, will be that the Postmaster General, disregarding the instructions of the Congress and with an eye only to the postal service, will have done serious damage to the fundamental national transportation policy of the Congress.

Implicit in the entire scheme of postal legislation is a recognition that the postal service is more than a business providing the public with a means for the delivery of its letters and packages. The maintenance of a postal service represents, also, a governmental function and the Congress has often required that this function be conducted so as to serve governmental purposes unrelated to the most efficient and rapid delivery of mail at the lowest possible cost. Thus, the belief of the Congress that all means of transportation must be maintained in a healthy, well-functioning condition is expressed in the National Transportation Policy of "developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899, 49 U.S.C. preceding section 1 (1952 ed.). The use of mail pay has always been recognized by the Congress as an important means of achieving this objective.

A decision that permits the Postmaster General in his discretion to arrange for the transportation of mail without giving adequate consideration to the ends that the Congress has sought to achieve in both postal and transportation legislation is obviously of great significance and deserves scrutiny by this Court.

We do not claim that the decision of the Court of Appeals on the merits conflicts with a decision of any other court. But, as we show in the next section, that court departed radically from the accepted cannons of statutory construction prescribed by this Court in many decisions. Moreover, this is not a situation in which this Court can wait for a conflict to develop, with the assurance that it will develop if the question is really important and well-justified differences of view are possible. The decision in this case will in all probability be the final word on the construction of the statutes under consideration, as the matter cannot be raised in any other circuit. The Postmaster General, against whom suit must be brought, resides in the District of Columbia, and venue in a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be laid "only in the judicial district where all defendants reside." 28 U.S.C. 1391(b) (1952 ed.); *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M.D. Pa.). Therefore, this important question of federal law which has not been, but which should be, settled by this Court must be settled in this case, if at all. See *Muncie Gear Co.* v. *Outboard Co.*, 315 U.S. 759, 766; *Exhibit Supply Co.* v. *Ace Corp.*, 315 U.S. 126, 128; *Schriber Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50.

Review by this Court under these circumstances is especially indicated since, as we show in the next section, the decision of the Court of Appeals is plainly erroneous and frustrates a long-standing Congressional policy of maintaining a substantial postage-rate differential between

mail transported by air and mail transported on the surface.

2. *The decision of the Court of Appeals is erroneous.* The position of petitioners on the merits, summarily stated, is as follows: The plain language of the relevant statutes, the legislative history of those statutes, the entire course of air-mail legislation, and the settled administrative construction of that legislation prior to the inauguration of the programs under attack make a uniform showing. They establish that the consistent Congressional policy has been, and is, to limit air transportation of mail to mail bearing the premium air-mail postage, with the exception of a few specific situations, expressly provided for by statute, where surface transportation is inadequate or impractical.

Despite the refusal of the Court of Appeals to accord the relevant statutes their literal meaning, because, in its view, the literal meaning was contrary to the Congressional intent, its opinion ignores most of the pertinent legislative history of those statutes and fails to relate them to other postal legislation and the course of development of air-mail legislation. It is necessary to deal with those matters at some length in this petition because the opinion below gives little or no aid in placing the issues in their relevant context.

a. *The relevant statutes.* The Congress in the Act of August 14, 1946, 60 Stat. 1062, provided that " 'domestic air mail' shall embrace all mailable matter being transported as mail by air within the continental United States, within any Territory or possession of the United States, within any geographical area which is a protectorate of the United States, or between any of the aforesaid." 39 U.S.C. 462a (1952 ed.). The same statute, in a section carried into the Code as 39 U.S.C. 463a (1952 ed.), provided that "the rate of postage on all domestic air mail *as defined in section 462a of this title* shall . . . be 6 cents for each ounce

or fraction thereof."[3] (Emphasis supplied.) The statutory language is unambiguous and its meaning is plain—any mail transported by air must bear the air-mail postage of six cents per ounce. This Court has held that unambiguous statutory language is to be given its ordinary, literal meaning, unless there is a strong showing that a literal construction would be contrary to the intent of the Congress. *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, 260; *Sturges* v. *Crowinshield,* 4 Wheat. 122, 202-203; see *Employees* v. *Westinghouse Corp.,* 348 U.S. 437, 444. And, as we show below, the evidence is overwhelming that the language chosen by the Congress reflects exactly the intent of the Congress.

b. *The legislative history.* The Court of Appeals did not deny that the Act of August 14, 1946 on its face bars air transportation of first-class mail. The court nevertheless refused to give the statute its literal meaning on the ground that such was not the intent of the Congress. In reaching this conclusion, the court relied almost entirely on prior definitions of "air mail" in the Air Mail Acts of 1925 and 1934. In the Air Mail Act of 1925, 43 Stat. 805, "air mail" was defined as "first-class mail prepaid at the rates of postage herein prescribed." In the Air Mail Act of 1934, 48 Stat. 933, "air mail" was defined as "mail of any class prepaid at the rate of postage prescribed in subsection (a) of this section." (Both statutes prescribed premium postage for "air mail.") Relying on a reading of this language isolated from its context, legislative history, and practical construction, the court below concluded that the distinguishing characteristic of air mail is not that "the Post Office transports [it] by air," but that "the sender has affixed [to it] special postage." (In short, the purchase price rather than the character of

[3] The 1946 Act provided for a postage rate of five cents per ounce. This was subsequently increased to six cents. 62 Stat. 1261.

service becomes the critical distinction between air mail and ordinary mail.) Hence, the argument proceeds, if we understand it correctly, as air mail is not distinguished from ordinary mail because it moves by air but because it carries six-cents postage, there is no bar to moving ordinary mail by air under these earlier definitions. "If that view is correct," the court continued, "the statutory definition of 'domestic air mail' [in the 1946 Act] does not preclude the Post Office from transporting by air matter other than 'air mail.' It must, generally speaking, transport by air matter to which the special postage has been affixed, but it is not required to demand the special postage for all matter which it transports by air."[4] The court thus read out of the 1946 definition of "domestic air mail" the words "all mailable matter being transported as mail by air," justifying its disregard of the plain words of the Act because the legislative history does not "mention any intent to circumscribe or change the then existing powers of the Postmaster General" with regard to the transportation of mail by air and in "the absence of clear indication of a Congressional intent to discard the established definition, we think the view urged by the railroads is untenable."[5]

This is the first time to our knowledge that a court has taken the position that where the plain language of a statute conflicts with an earlier statute, the subsequent enactment is to be ignored unless it can be affirmatively shown from the legislative history that the Congress intended what

[4] See Appendix B, p. 43, *infra*.

[5] See *Appendix* B, pp. 49, 44, *infra*. The Court of Appeals correctly concluded from the legislative history that the Congress in the 1946 Act intended to reduce the disparity between the "premium air-mail rate" then in effect and the "surface rate" and to extend the continental air-mail rate to the territories. But to hold that these were the sole purposes of the Act is to deny the words "all mailable matter being transported as mail by air" any effect whatsoever. Certainly, this language is not a "geographical description" and has nothing to do with the relationship between air-mail and surface-mail postage rates.

it said. The rule prescribed by this Court is that while repeals by implication are not favored, the later statute will be given effect when there is a clear inconsistency with an earlier act.[6] *Georgia* v. *Pennsylvania R. Co.* 324 U.S. 439, 456-457; *United States* v. *Yuginovitch,* 256 U.S. 450. Although a change in terminology will not be held to show a change in the Congressional intent when there is "more persuasive evidence" in the legislative history that a change was not intended, *United States* v. *Dickerson,* 310 U.S. 554, 561, in the absence of such evidence it will be presumed that a change was intended. *Brewster* v. *Gage,* 280 U.S. 327, 337; *Crawford* v. *Burke,* 195 U.S. 176, 190.

In any event, the failure of the legislative history to indicate affirmatively that the law was being changed is readily explainable by the fact that no change was involved—the law has always been, except in limited circumstances under express statutory provisions, that only air mail can be transported by air. The reports and hearings on the 1946 Act show conclusively that the Congress, in considering and enacting that statute, was of the view that under the then-existing law "air mail" included all mail transported by air and that mail not bearing air-mail postage could be transported only by surface means. Thus, in S. Rept. No. 1834, 79th Cong., 2d Sess., at p. 2, it is stated that:

> "The experience of the postal service indicates that the disparity between the *surface rate for first-class mail of 3 cents per ounce and the premium air-mail rate of 8 cents per ounce* is too great for matter other than that of high time value. Furthermore, evidence was introduced at the hearings which indicates that a penalty has been placed upon the use of air mail by

[6] The various definitions are not inconsistent. If the prior definitions of "air mail" are read into the definition of "domestic air mail", as suggested by the Court of Appeals (Appendix B, p. 49, *infra*), the sense of the 1946 Act would not be changed. It would read: "first-class mail [or mail of any class] prepaid at the rates of postage herein prescribed shall embrace all mailable matter being transported as mail by air."

the 8-cent rate which is all out of proportion as between postage rate and postal cost.

"Cost-ascertainment computations indicate that *air mail at a 5-cent rate* would return a slightly higher net profit per pound than does *ordinary first-class mail at the surface rate of 3 cents.* Therefore, H. R. 5560 proposes to remove the penalty and put these *two services, surface and air,* on approximately equal footing—the mailer to take his choice in accordance with the importance of his communications, without being deterred by an excessive air-mail postage rate.

* * * * * * *

". . . The 5-cent rate proposed by H. R. 5560 would restore the privilege [of using air mail] . . ., and at the same time high-speed service will be afforded to those patrons who must forego its use as long as *the differential between surface and air service remains as 3 to 8 cents.*" (Emphasis supplied.) [7]

That the 1946 Act in defining "domestic air mail" to include "all mailable matter being transported as mail by air" merely made explicit what had theretofore been clearly implicit, and that, as the Congress assumed in enacting the 1946 law, the Postmaster General has never had a general authority to transport all classes of mail by air, is also clear from the statutory context, legislative history, and settled administrative construction of the prior definitions of "air mail," and from the entire course of air-mail legislation. This material, which was ignored in the opinion of the Court of Appeals, is discussed in the following sections.

c. *The prior air-mail legislation.* Respondent, of course, must do more than show that the Congress has not prohibited the transportation of first-class mail by air. He must

[7] See also, H. Rept. No. 1986, 79th Cong., 2d Sess., p. 2; Hearings on H. R. 5560 before the Senate Committee on Post Offices and Post Roads, 79th Cong., 2d Sess., pp. 32, 40, 61.

also establish that the Congress has affirmatively authorized such transportation. *Beach* v. *United States*, 226 U. S. 243. The Air Mail Act of 1925, the first general statute providing for private transportation of mail by air, empowered the Postmaster General to contract "for the transportation of air mail by aircraft" and also "for the transportation by aircraft of first-class mail other than air mail." The legislative history of the Act reveals that it was understood that ordinary first-class mail would be carried only when there was insufficient air mail to make up a capacity load. See 66 Cong. Rec. 751. A 1930 amendment, 46 Stat. 259, retained the definition of "air mail" in the 1925 Act, but expressly restricted air transportation of first-class mail to that necessary to utilize space contracted for that could not be used for air mail.[8]

The Air Mail Act of 1934 provided only for "the transportation of air mail by airplane," and thus eliminated the limited prior authority of the Postmaster General to transport first-class mail by air. The intentional repeal of this prior authorization denotes that the Congress intended by the Air Mail Act of 1934 to restrict air transportation of mail to air mail,[9] as defined in the Act, and respondent admitted before the Court of Appeals that this was the effect of the statute.[10] The Comptroller General has also ruled that the 1934 Act did not permit air transportation of first-class mail. No. A-74912, 15 Comp. Gen. 1025.

[8] When, in 1930, revision of the 1925 Act was under consideration, the Postmaster General testified that it was necessary to retain a provision authorizing air transportation of non-air mail in order to permit any utilization of this excess space. Hearings on H.R. 9500 before House Committee on Post Offices and Post Roads, 71st Cong., 2d Sess., pp. 12-17.

[9] The committee reports on the 1934 Act also indicate that it was intended to provide only for transportation of air mail. S. Rept. No. 574, 73rd Cong., 2d Sess.; H. Rept. No. 1428, 73rd Cong., 2d Sess.; H. Rept. No. 1754, 73rd Cong., 2d Sess. (Conference Report).

[10] At page 40 of his main brief filed with the Court of Appeals, in footnote 29, it is stated that: ". . . from 1934 to 1938 Alaska was the only area where the Postmaster General could contract for the transportation of all classes of mail by air."

Hence, the definitions of "air mail" enacted by the Congress in the 1925 and 1934 Acts, when viewed in the light of their statutory context, legislative history, and settled administrative construction, lend no support to the conclusion of the court below that the Postmaster General could transport all classes of mail by air prior to the Act of August 14, 1946. Rather, their origin in statutes that admittedly limited air transportation of mail to air mail except, in the case of the 1925 Act, where the use of first-class mail was necessary to fill excess space contracted for, confirms petitioners' view that the Congress has never authorized the Postmaster General to transport ordinary mail by air except in limited circumstances where expressly authorized.

Respondent contended before the Court of Appeals that authority for the transportation of three-cent mail by air is given by the provisions of the Civil Aeronautics Act of 1938[11] amending the post roads statute (39 U.S.C. 481-483 (1952 ed.)) to include "air routes," authorizing the Postmaster General to tender mail to certificated air carriers, and defining "mail" as used in the Act to include "United States mail and foreign-transit mail," without express limitation to air mail. Here again, however, the contention ignores the statutory context and legislative history of the Act, and is rested on language much more ambiguous than that found in the Act of August 14, 1946 which the Court of Appeals refused to give its ordinary meaning.

The Civil Aeronautics Act was primarily intended as a broad and comprehensive charter governing federal regulation of air transportation.[12] It is natural, therefore,

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[11] 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.* (1952 ed.). Although its opinion is not entirely clear on this point, the Court of Appeals apparently did not rest its conclusion that the Postmaster General has authority to transport first-class mail by air on these provisions, but only regarded them as being "consistent" with its conclusion. See Appendix B, p. 46, *infra*.

[12] See the declaration of policy, 52 Stat. 980, 49 U.S.C. 402 (1952 ed.).

that in placing air carriers on a common-carrier basis and requiring them to transport mail tendered by the Postmaster General, the draftsmen of the statute defined "mail" *for purposes of the Civil Aeronautics Act* in the broadest terms. That Act was expected to remain substantially unchanged for the foreseeable future, and the provisions of the postal statutes, Title 39 of the Code, regulating the kinds of mail that the Postmaster General could transport by air very possibly would be varied substantially throughout the years to come as they had been in the past. By broadly defining "mail" for purposes of the Act, the Congress could assure that whatever the extent of the authority of the Postmaster General to arrange for the transportation of mail by air under the postal statutes at any particular time, the airlines could, under the Civil Aeronautics Act, be compelled to transport such mail. It is clear, both from the context of the Act and from its legislative history, that the Congress intended to do no more than this; the Postmaster General's authority was to remain limited to arranging for air transportation of mail bearing air-mail postage, as had been the case since 1934.

While the Civil Aeronautics Act repealed the provisions of the Air Mail Act of 1934 authorizing the Postmaster General to contract for air transportation of air mail and substituted a common-carrier obligation of certificated air lines to move mail tendered by the Postmaster General, section 1107(k) of the Civil Aeronautics Act excepted from repeal sections 2(a) and 2(b)(1) of the earlier Act. Section 2(a) fixed the air-mail postage rate and section 2(b)(1) contained the definition of "air mail." Thus, the draftsmen of the Civil Aeronautics Act carefully left in effect the key provisions of the 1934 Act that established a special air-mail service to which alone air transportation was, under that Act, available. Moreover, in section 405(k) of the Civil Aeronautics Act, 49 U.S.C. 485(k) (1952 ed.),

the Congress expressly empowered the Postmaster General to contract "for the transportation by aircraft of *any or all classes* of mail to or from localities affected" by calamitous visitations. (Emphasis supplied.) This use of the language "any or all classes of mail" is under respondent's theory explainable only in terms of negligent drafting. If, as respondent contends, the Congress took pains to define "mail" so as to include any or all classes of mail, with reference to the Postmaster General's authority to provide air transportation for mail, then it would be expected to have used the defined term rather than spelling out "any or all classes of mail" in section 405(k). If on the other hand, as we contend, section 405(g) is intended only to obligate the airlines to move such mail as the Postmaster General, under authority of the postal laws, tenders them, then the use of "any or all classes of mail" in section 405(k) is readily explainable as authorizing the Postmaster General, in emergency circumstances, to arrange, as he would not otherwise be authorized to arrange, for air movement of "any or all classes of mail".

The legislative history of the Act likewise demonstrates that the Congress did not intend to broaden the Postmaster General's authority with respect to the kinds of mail that he could arrange to transport by air. Two of the bills that preceded the one finally enacted as the Civil Aeronautics Act (H.R. 5234, 75th Cong., and S. 2, 75th Cong.) defined "mail" as mail prepaid at the airmail postage rate. Clearly, those bills were not intended to remove the restriction in the Air Mail Act of 1934 against the transportation by air of non-air mail, as respondent conceded before the Court of Appeals.[13] H.R. 5234 was

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[13] At page 30 of his main brief filed with the Court of Appeals, the cited bills are referred to with the statement that "the restriction to air mail" required by the definition of "mail" in those bills was eliminated in the statute as enacted.

amended and reintroduced as H.R. 7273, 75th Cong. The latter bill dropped the definition of "mail" but expressly left in effect the similar definition of "air mail" contained in the Air Mail Act of 1934. That this bill was intended to authorize air transportation only of air mail is plain from the House Report (No. 911, 75th Cong., 1st Sess.) where it is stated, at p. 18, that: "Rates for the carriage of *air mail* would be fixed by the Commission." (Emphasis supplied.)

Various objections to the bills already introduced caused the President to appoint an Interdepartmental Committee on Civil Aviation to consider the matter. The Interdepartmental Committee drafted a bill, introduced as H.R. 9738, 75th Cong., that was virtually identical to the Civil Aeronautics Act, including the definition of "mail." A representative of the Interdepartmental Committee in pointing out the 19 "major differences in policy" between H.R. 9738 and the previous bills did not indicate in any way that H.R. 9738 was intended to broaden the provisions of the earlier bills to permit transportation by air of all classes of mail.[14] On the contrary, he used the terms "mail" and "air mail" interchangeably in discussing the provisions relating to the transportation of mail in H.R. 9738 and in a companion bill, S. 3760, 75th Cong.[15] We have not discovered any reference in the legislative history of the Civil Aeronautics Act to an intention to change the policy expressed in the 1934 Act of requiring that all mail transported by air bear the air-mail postage rate. This can hardly be accidental in view of the importance of the matter and the thoroughness of the consideration given by the Congress to that legislation.

Both the Congress and the Postmaster General, shortly

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[14] Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., pp. 37-46.

[15] *Ibid;* Hearings on S. 3760 before the Senate Committee on Commerce, 75th Cong., 3d Sess., pp. 1-4.

after the enactment of the Civil Aeronautics Act, were clearly of the view that that Act did not give the Postmaster General authority to transport all classes of mail by air. The Civil Aeronautics Act had repealed the Act of August 24, 1935, 49 Stat. 744, which had given the Postmaster General authority to contract for the transportation by air of all classes of mail in Alaska. In 1940, the Postmaster General submitted to the Congress a request for enactment of a bill permitting the transportation by air of all classes of mail in Alaska, since the repeal of the earlier Act had:

> ". . . left the Department without specific authority to continue the transportation of all classes of mail by aircraft in Alaska and legislation is regarded as very necessary to permit of the continued transportation of all classes of mail by aircraft in the Territory without conflict with the Civil Aeronautics Act of 1938." H. Rept. No. 2736, 76 Cong., 3rd Sess., p. 3.

Congressional debate on this bill made clear that both the Post Office Department and the Congress were of the view that only air mail could be tendered to air carriers certificated under the Civil Aeronautics Act.[16] The Con-

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[16] Mr. Dimond:

"When the Civil Aeronautics Act with respect to air mail was passed recently, one provision of the Act said that the existing contracts for the carriage of all classes of mail in Alaska would be continued in effect until the Civil Aeronautics Authority should apply the Act to Alaska by issuing certificates of public convenience and necessity and prescribing rates of compensation. Up to the present moment no such certificate has been issued for any of the routes carrying all classes of mail by air.

"The Civil Aeronautics Authority now desires to put the act into effect in Alaska, and if that is done all existing mail contracts for carriage of mail by air will be cancelled. *Under the Civil Aeronautics Act it is possible to carry air mail only, as is said by the Post Office Department;* therefore the Post Office Department would in that event be required to carry other classes of mail by dog teams or horses, at a much greater cost to the Government.

"The purpose of this bill is to permit the continuance of the carriage of

gress thereupon enacted a law, 54 Stat. 1175, 39 U.S.C. 488a (1952 ed.), substantially in the terms proposed by the Postmaster General, providing that, when required by the Postmaster General, air carriers certificated under the Civil Aeronautics Act to engage in the transportation of mail in the Territory of Alaska "shall . . . transport, in addition to mail on which [air-mail] postage shall have been paid . . ., *any other classes* of mail bearing the appropriate postage for its respective class, and the Postmaster General is authorized to require such transportation." (Emphasis supplied.)

The Court of Appeals did not attempt to explain why this specific statutory authorization was necessary if the Postmaster General has a broad, discretionary authority to transport by air any class of mail whether or not it bears air-mail postage, and, indeed, there is no satisfactory explanation other than that the Congress has always considered air transportation to be limited to air mail except when otherwise provided by specific statutory language.

The Court of Appeals did express concern that "to accord 'domestic air mail' the meaning urged by the railroads would give rise to serious statutory conflicts" with the spe-

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all classes of mail in Alaska by air under the Civil Aeronautics Act just the same as is the case at the present time, and it will put the full control in the hands of the Civil Aeronautics Authority. . . ."

Mr. Martin of Massachusetts:

"It is not really necessary to have this legislation. This compels them to transport mail by air, whereas it would be optional otherwise?"

Mr. Dimond:

"No it would not be optional. In the opinion of the Solicitor of the Post Office Department, as I understand, if the Civil Aeronautics Authority puts the Civil Aeronautics Act completely in effect in Alaska, it would no longer be possible to carry all classes of mail by air and it would be necessary to go back to the old and more costly method of carrying all except air mail on the ground by dog teams or on horseback or in some other kindred fashion." 86 Cong. Rec. 9680. (Emphasis supplied.)

cial statutes permitting the Postmaster General to transport by air "any or all classes of mail" in certain limited situations, in that to construe the Act of August 14, 1946 as requiring that all mail transported by air bear air-mail postage would "nullify these prior statutes." Appendix B, at pp. 44-45, *infra*. But, this ignores the general rule of statutory construction that "where there are two statutes, the earlier special and the later general, the special controls the general, and the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general. The general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. Rogers v. United States, 185 U. S. 83. . . ." *Baltimore & O. R. Co.* v. *Chicago River & Indiana R. Co.*, 170 F.2d 654, 658 (C.A. 7).[17] It seems to us that the Court of Appeals might much more appropriately have been concerned with the question of why the Congress bothered to enact these special statutes if the Postmaster General has a broad, discretionary authority to transport all classes of mail by air under the provisions of the Civil Aeronautics Act.

d. *The subsequent air-mail legislation.* The events leading up to the enactment of legislation authorizing an air parcel-post service illustrate that both the Post Office Department and the Congress, after the passage of the Act of August 14, 1946, understood that the Department did not have a general authority to transport non-air mail by air, even on a space-available basis. In 1948, some of the payments to air carriers for mail transportation were based

[17] Moreover, once it is recognized that the Congress has always accepted the principle that non-air mail can be carried by air only when expressly authorized and that the 1946 Act merely reaffirmed this principle in explicit terms, the apparent conflict disappears entirely.

on minimum load guarantees, millions of ton-miles of which were not being used because of insufficient air-mail volume. The Postmaster General did not fill this extra space with first-class mail or ordinary parcel post since he considered that this would be beyond his statutory authority. The Congress shared this view, as is evident from the following comments in H. Rept. No. 2163, 80th Cong., 2d Sess., p. 2:

> "The Civil Aeronautics Board has recently been establishing rates upon the volume of mail. They have accomplished this by setting minimum load requirements upon which the Post Office Department pays the ton-mile rate established for the particular carrier. These minimum load requirements have been revised consistently upward till now they are at the point where the *Post Office is paying for a large amount of space which they cannot use under present laws and conditions.* The establishment of this service [parcel post] will create an additional volume of mail which will utilize this space at no extra cost to the Post Office Department." (Emphasis supplied.)

The Congress, therefore, enacted the Air Parcel Post Act, 62 Stat. 1097, 39 U.S.C. 475 (1952 ed.), establishing a premium "rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, *when carried by air.*" (Emphasis supplied.)

The same understanding by the Postmaster General and by the Congress was shown as recently as 1949. The Air Star Route Act, 52 Stat. 219, enacted by the same Congress that enacted the Civil Aeronautics Act, had authorized the Postmaster General to award contracts "for the transportation of any or all classes of mail by airplane upon star routes not over two hundred airplane-miles in length" where necessary because of the inadequacy or imprac-

ticability of surface transportation. In 1949, the Postmaster General requested the Congress to remove the restriction limiting to 200 miles or less the length of such air star routes, since:

> "The certification of air routes under provisions of the Civil Aeronautics Act of 1938, as amended, is not justified in most of the areas herein considered because, *when restricted to air mail bearing the airmail postage rate,* the volume would not be sufficient to warrant the high cost of conventional certified service. On the other hand, if the service were obtained for all classes of mail at a competitive contract rate, the cost might be reasonable and fully warranted." H. Rept. No. 563, 81st Cong., 1st Sess., p. 3.

Consequently, the Congress amended the Act to remove the restriction and permit the Postmaster General to "award contracts for the transportation by aircraft upon star routes of *any or all classes* of mail *(including but not limited to air mail and air parcel post)"* where surface transportation is impracticable or inadequate. (Emphasis supplied.) 63 Stat. 680, 39 U.S.C. 470 (1952 ed.).

e. *Administrative construction of the air-mail statutes.* Until the inauguration of the recent experimental programs for the transportation of three-cent mail by air, the consistent view of the Post Office Department had been that only air mail could be transported by air except in the special situations covered by statute. We have already noted repeated instances in which the Department advanced this restriction as grounds for the enactment of legislation authorizing air transportation of all classes of mail, as the Alaska and Air Star Route Acts, or of particular classes of mail not bearing the normal air-mail postage, as the Air Parcel Post Act.

The Department's regulations and its Postal Guide, be-

fore the institution of these experimental operations, also indicated that only air mail could be transported by air under the general authority of the Department. "Domestic air mail" was defined in the regulations in precisely the statutory language as "all mailable matter being transported as mail by air," 39 C.F.R. 34.89(a) (1949 ed.), and it was provided that the "rate of 6 cents an ounce . . . will apply to all domestic air mail." 39 C.F.R. 34.88(b)(2) (1949 ed.). The U.S. Official Postal Guide, Part I, dated July 1953, under Chapter III entitled "Domestic Mail Matter," carried the following Article 12:

> "12. *Air Mail and air parcel post rates.*—The rates of postage in this article apply to *mail transported by air* in the domestic mails. (See arts. 2 and 3 of this chapter).
>
> (a) *Letters and packages,* not exceeding 8 ounces are chargeable with postage at the rate of 6 cents an ounce or fraction of an ounce. Air post and postal cards are acceptable at 4 cents each.
>
> (b) *Air Parcel Post.* Parcels exceeding 8 ounces, but not exceeding 70 pounds, which may include any class of mail matter intended for air transportation, are subject to the rates shown in the following schedule, according to zone location and weight . . ."
>
> (Emphasis supplied.)

f. The priorities allegedly accorded air-mail. The Court of Appeals, in support of its views as to the authority of the Postmaster General to transport three-cent mail by air, suggested that the distinguishing feature of a "real air-mail service" for which air-mail postage is to be charged is that it "involves many priorities" and that "the carriers must transport this mail on an imperative priority basis." Appendix B, p. 45, *infra.* The court reasoned that since

the three-cent mail is tendered to the air lines on a space-available basis, such mail does not receive a "real air-mail service" justifying the higher air-mail postage charge.[18] Respondent, in the court below, advanced a similar contention and referred to priorities allegedly accorded air mail in handling and distribution in the post offices, at terminals and transfer points, and in transportation.

The Court of Appeals advanced those "considerations" only as a "support" for its conclusions already reached, and did not suggest that, standing alone, they would provide an alternative ground for its decision. The frailty of this support becomes clear once the nature of the legislation respecting air mail is considered. From the beginning of the service to date the legislative provisions respecting air mail have been confined basically to a definition of air mail, a prescription of air-mail postages rates, and authority to contract for or require on a common-carrier basis the air movement of such mail. Prior to the 1946 Act, air mail was defined as first-class mail, or as mail of any class, prepaid at the premium air-mail rate. In the 1946 Act, the definition became all mailable matter transported as mail by air and it was prescribed that such mail should carry the premium rate.

It cannot reasonably be denied that by these provisions the Congress intended to establish an air-mail service. That service was intended to be entirely distinct from the

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[18] The Court of Appeals stated that "so far as the record indicates, the variation in cost between carriage by rail and carriage by air on a non-priority, space-available basis is not substantial." It should be pointed out that permanent rates for the transportation of three-cent mail by air under the west-coast program in question here have not yet been fixed by the Civil Aeronautics Board. The mail is now being flown under temporary rates subject to retroactive adjustment when the proper permanent rates are determined, so that at this time the cost of air transportation is uncertain. Petitioners believe that it will eventually exceed the cost of rail transportation by a considerable margin.

service provided for first-class mail. Respondent conceded as much in the courts below. Presumably, respondent also would not contest the proposition that the Congress was not practicing a fraud on the American people. When it exacted a double price for air-mail service, it intended to give in return something reasonably worth double the price of ordinary first-class mail. But while respondent conceded that these statutory provisions obligate him to provide an air-mail service distinct from and considerably better than that accorded in the first-class mail service, he asserts that this distinction does not lie in the air movement of air mail as distinguished from surface movement of other classes of mail.

What respondent says is that in providing for air mail the Congress intended to establish a distinct service, but the distinction intended is some difference in the priorities accorded the two classes of mail while handled on the ground. In the affidavits filed on behalf of respondent in this proceeding, the only substantial priority claimed to be accorded an air mail letter that is not also received by an ordinary first-class letter transported by air between the same points is that the air carrier must accept the air mail letter while it need accept the first-class letter only if space is available on the flight after satisfying other demands. [19]

In point of fact, it appears that this co-called priority is largely illusory, since the air carriers always have more than enough space available. Thus, Member Gurney of the

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[19] The affidavit of Postmaster General Summerfield mentions only the fact that the air carrier may reject first-class mail if space is not available. (J.A. 46.) The affidavit of Assistant Postmaster General Seidle does refer to certain differences in the handling of the mails by post office personnel, but on analysis these differences amount in substance to little more than recognition of the possibility that the three-cent mail may be rejected by the air carrier if space is not available. (J.A. 53-55.)

Civil Aeronautics Board, dissenting in *Surface Mail by Air Exceptions*, Docket Nos. 6882, 6905, and 6940 (decided May 2, 1955), stated: ". . . that so far as the Board is aware, *there has never been a single pound of surface mail refused for lack of space* by the certificated carriers." (Emphasis in the original.) And, in a recent press release, the Post Office Department announced that *all* mail between many of the major cities served by the experimental programs is transported by air.[20]

It seems clear that the possibilities that space will not be available are sufficiently remote and any other priorities accorded air mail are so inconsequential as completely to negative any suggestion that such are the differences intended by the Congress to justify the double postage rate imposed on air mail. But even if today those distinctions were significant, there is nothing in the statutes to prevent the Postmaster General from tomorrow giving three-cent mail the same handling on the ground as is given air mail. There is no reference to such priorities in the entire thirty years of legislation relating to air mail, either in the terms of any statute or, insofar as we could find, in the legislative history of any statute.[21]

That the Congress considered air transportation to be the distinctive characteristic of air mail justifying the premium postage rate charged therefor, rather than priorities in handling on the ground, is obvious from its use of the descriptive adjective "air." The provisions in the

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[20] Post Office Department Press Release No. 229, dated October 6, 1955.

[21] While the postal regulations direct that air mail is to receive expeditious treatment, neither those regulations nor the Postal Guide ever provided, until this controversy arose, any basis for an assertion that such expeditious handling is the critical factor distinguishing air mail from other classes of mail. See pp. 23-24, *supra*.

postal statutes relating to "special delivery" and "special handling" of mail reveal that the Congress knows how to provide for, and label, mail that is to receive priorities in handling on the ground for which an extra charge is made, when it so desires. See 39 U.S.C. 164-169a, 246f, 276d, 292a(f) (1952 ed.). If air transportation is not limited to air mail, then the Congress in providing for air mail has enabled the Postmaster General to collect a double charge from an unsuspecting public for a service that the Congress did not require be essentially different from that which a letter would receive at the ordinary postage rate. It seems clear that a decision attributing such an intention to the Congress should be reviewed by this Court.

It is apparent that respondent's present experimental programs have already confused the distinction between air mail and first-class mail, and that, under the opinion of the court below, he may erase altogether any differences between the two services. It is inconceivable to us that the Congress ever intended to entrust to the Postmaster General this power virtually to destroy a mail service for which it has long expressly provided by statute, especially in view of the frequently expressed Congressional concern with maintaining and increasing revenues from air mail and with eliminating the postal deficit.[22]

g. The Congress has not ratified the operation in question. We will touch quickly on the Congressional ratification argument advanced by respondent since it is referred to in the opinion of the Court of Appeals. Essentially, this argument is that Congressional approval and ratification of the experimental programs should be inferred from references to the programs in various committee reports and

[22] See, e. g., H. Rept. No. 416, 83rd Cong., 1st Sess., pp. 20-21; S. Rept. No. 373, 83rd Cong., 1st Sess., p. 4; H. Rept. No. 2619, 83rd Cong., 1st Sess., p. 1; H. Rept. No. 1252, 83rd Cong., 2nd Sess., pp. 4-5; H. Rept. No. 2358, 80th Cong., 2d Sess., p. 4; S. Rept. No. 1834, 79th Cong., 2d Sess.

hearings and from a one-sentence proviso in an appropriations act, 68 Stat. 148, requiring the Postmaster General to report the total cost of "the eliminated and replacement service for airline, truck and railroad transportation." The Court of Appeals did not conclude that these limited activities constituted a Congressional ratification of the respondent's experimental programs, and could not properly have done so, since such incidental activities in no wise comprise the express recognition and approval of administrative action that has been found to amount to Congressional ratification of such action in cases like *Fleming* v. *Mohawk Co.*, 331 U. S. 111, and *Brooks* v. *Dewar*, 313 U. S. 354.

But, the court below did state that "the indications of implied legislative approval are entitled to weight." Appendix B, p. 47, *infra*. In this, the court is clearly in error. The Congress has either ratified this experimental program or it has not done so. Both lower courts properly found that it had not done so. If there had been ratification that would be the end of the matter. As there has not been ratification, no help can properly be derived from the facts upon which respondent urged that ratification could be found, just as no effect can be given a bill that is considered but not enacted by the Congress.

Conclusion

This is a test case presenting a novel question of federal statutory construction having great importance to the transportation industry in general and to the public, as well as to the litigants. The decision in this case will, in all probability, be the final word on the authority of the Postmaster General to transport all classes of mail by air under the existing statutory provisions. The opinion of the Court of Appeals is demonstrably erroneous, and the

matter is one that should be finally, and correctly, settled by this Court. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Air Mail Act of 1925, 43 Stat. 805:

Sec. 2. That when used in this Act the term "air mail" means first-class mail prepaid at the rates of postage herein prescribed.

Sec. 3. That the rates of postage on air mail shall not be less than 10 cents for each ounce or fraction thereof.

Sec. 4. That the Postmaster General is authorized to contract with any individual, firm, or corporation for the transportation of air mail by aircraft between such points as he may designate at a rate not to exceed four-fifths of the revenues derived from such air mail, and to further contract for the transportation by aircraft of first-class mail other than air mail at a rate not to exceed four-fifths of the revenues derived from such first-class mail.

Act of April 29, 1930, 46 Stat. 259:

* * * The Postmaster General is authorized to award contracts for the transportation of air mail by aircraft between such points as he may designate to the lowest responsible bidder at fixed rates per mile for definite weight spaces, one cubic foot of space being computed as the equivalent of nine pounds of air mail, such rates not to exceed $1.25 per mile: *Provided*, That where the air mail moving between the designated points does not exceed twenty-five cubic feet, or two hundred and twenty-five pounds, per trip the Postmaster General may award to the lowest responsible bidder, who has owned and operated an air transportation service on a fixed daily schedule over a distance

of not less than two hundred and fifty miles and for a period of not less than six months prior to the advertisement for bids, a contract at a rate not to exceed 40 cents per mile for a weight space of twenty-five cubic feet, or two hundred twenty-five pounds. Whenever sufficient air mail is not available, first-class mail matter may be added to make up the maximum load specified in such contract.

Air Mail Act of 1934, 48 Stat. 933:

Sec. 2 (a) Effective July 1, 1934, the rate of postage on air mail shall be 6 cents for each ounce or fraction thereof.

(b) When used in this Act—

(1) The term 'air mail' means mail of any class prepaid at the rate of postage prescribed in subsection (a) of this section.

• • • • • • •

Sec. 3 (a) The Postmaster General is authorized to award contracts for the transportation of air mail by airplane between such points as he may designate, and for initial periods of not exceeding one year, to the lowest responsible bidders tendering sufficient guaranty for faithful performance in accordance with the terms of the advertisement at fixed rates per airplane mile: • • •

Civil Aeronautics Act of 1938, 52 Stat. 973 et seq. (49 U.S.C. 401 et seq.):

Section 1. As used in this Act, unless the context otherwise requires—

• • • • • • •

(23) 'Mail' means United States mail and foreign-transit mail.

* * * * * * *

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * * * *

Sec. 405.

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(g) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

* * * * * * *

(k) In the event of emergency caused by flood, fire, or other calamitous visitation, the Postmaster General is authorized to contract, without advertising, for the transportation by aircraft of any or all classes of mail to or from localities affected by such calamity, where available facilities of persons authorized to transport mail to or from such localities are inadequate to meet the requirements of the Postal Service during such emergency. Such contracts may be only for such periods as may be necessitated, for the maintenance of mail service, by the inadequacy of such other facilities. No operation pursuant to any such contract, for such period, shall be air transportation within the purview of this Act. Payment of compensation for service performed under such contracts shall be made, at rates provided in such contracts, from appropriations for the transportation of mail by the means normally used for transporting the mail transported under such contracts.

* * * * * * *

Sec. 1107.

(a) Section 3964 of the Revised Statutes is hereby amended by adding "and all air routes", after the words "or parts of railroads."

• • • • • • •

(k) Sections 2(b)(2) and (3), 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, and so much of section 8 as reads . . ., of the Act of June 12, 1934, as amended (48 Stat. 933); . . . and all other Acts or parts of Acts inconsistent with any provision of this Act are hereby repealed.

Transportation Act of 1940, 54 Stat. 899 (49 U.S.C. preceding section 1):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and

of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Act of October 14, 1940, 54 Stat. 1175 (39 U.S.C. 488a):

• • • whenever required by the Postmaster General, any air carrier authorized by the Civil Aeronautics Authority under title IV of the Civil Aeronautics Act of 1938 to engage in the transportation of mail in the Territory of Alaska shall, within the limits of such authorization, transport, in addition to mail on which postage shall have been paid at the rate provided by the Act of June 12, 1934 (48 Stat. 933), as amended, any other classes of mail bearing the appropriate postage for its respective class, and the Postmaster General is authorized to require such transportation.

Act of August 14, 1946, 60 Stat. 1062 (39 U.S.C. 462a):

Sec. 2. As used in this Act, "domestic air mail" shall embrace all mailable matter being transported as mail by air within the continental United States, within any Territory or possession of the United States, within any geographical area which is a protectorate of the United States, or between any of the aforesaid: • • •

Postal Rate Revision and Federal Employees Salary Act of 1948, 62 Stat. 1261 (39 U.S.C. 463a):

Sec. 201. The rate of postage on all domestic air mail as defined in Public Law 730, Seventy-ninth Congress, shall, except in the case of postal cards and private mailing or post cards, be 6 cents for each ounce or fraction thereof. The rate of postage on postal cards and private mailing or post cards . . ., when sent by air mail, shall be 4 cents each.

Air Parcel Post Act, 62 Stat. 1097 (39 U.S.C. 475):

> • • • the rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air mail routes, shall, except as otherwise herein provided, be determined on the basis of the eight postal zones established for fourth-class matter, as follows: • • •

Air Star Route Act, as amended, 63 Stat. 680 (39 U.S.C. 470):

> Sec. 6(a). Whenever he shall find it to be in the public interest, because of the nature of the terrain, or the impracticability or inadequacy of surface transportation, and where the cost thereof is reasonably compatible with the service to be provided, the Postmaster General may award contracts for the transportation by aircraft upon star routes of any or all classes of mail (including but not limited to air mail and air parcel post), payment for such service to be made from the appropriation for inland transportation by star routes: • • •

APPENDIX B

Before EDGERTON, Chief Judge, and PRETTYMAN and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is an action brought in the District Court by certain railroads for declaratory judgment and injunctive relief against the Postmaster General. It was alleged in the complaint that the Postal Service has conducted an experimental operation in the trans-

portation of first-class (three-cent) mail by air between designated localities since early October, 1953; and that on October 6, 1954, the Postmaster General filed a petition with the Civil Aeronautics Board asking the Board to establish a rate of compensation for such transportation between additional localities, some or all of which are served by one or more of the plaintiff railroads. The railroads asserted that the proposed service is unlawful, void, and beyond the statutory authority of the Postmaster General. The Postmaster General answered. Both sides moved for summary judgment. The District Court granted summary judgment to the plaintiff railroads. It held that the Postmaster General has the right to experiment in the transportation of mail but that prolonged experimental dispatch of three-cent mail by air is not within his statutory authority. At the same time, the court denied the railroads' motion for a permanent injunction, on the ground that irreparable injury had not been shown. The Postmaster General appealed, and the railroads then appealed from those parts of the court's order which sustained the power to experiment provided the operation were not unduly prolonged, and from that part of the order denying the permanent injunction.

The West Coast experiment is the fourth such operation to be instituted. The plan is to tender to air carriers for transportation ordinary first-class mail when, as and if empty space is available on a flight after all other traffic, including mail bearing the special air-mail postage, is accommodated. Ordinary mail thus transported is not to receive expedited handling, transportation or distribution. The object of the experiments, the Postmaster General says, is to gain experience from which it can be determined whether improvements and economies might be achieved by this method.

We are met first with the contention of the Postmaster

General that the plaintiff railroads have no standing to sue, that is, that they have no right to initiate judicial inquiry into the legality of his action. He argues the statutes bestow on the railroads only a right to reasonable compensation for services actually performed; they give the railroads no right to perform these services; but the lawsuit seeks to protect a right to perform. Further, the Postmaster General says the plaintiffs have no common-law right to contest his action, since they are merely competitors of the airlines within the rule laid down in such cases as *Alabama Power Co.* v. *Ickes*[1] and *Kansas City Power & Light Co.* v. *McKay.*[2]

The carriage of mail by the railroads is governed by statute.[3] All railroad common carriers are required to carry such mail as may be offered for transportation by the Postmaster General,[4] and they are required to furnish all necessary facilities for carrying and handling the mail while it is in their custody, furnishing cars, station space, and rooms for handling storage and transfer.[5] They must carry the mail on the trains and in the manner the Postmaster General prescribes.[6]

The statute imposes substantial obligations on the plaintiff railroads. Under its terms they have been compelled to make substantial investments in special equipment for handling and carrying the mails. A necessary effect of the Postmaster General's action in tendering three-cent mail for transportation by air is to prevent useful employment of parts of these very considerable investments. Thus, contrary to the contentions of the Postmaster General, more

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[1] 302 U.S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).
[2] 95 U.S. App. D.C. —, 225 F. 2d 924 (D.C. Cir. 1955), *cert. denied*, — U.S. — (Nov. 7, 1955).
[3] 39 STAT. 425 (1916), 39 U.S.C.A. §§ 524 *et seq.*
[4] 39 STAT. 429 (1916), 39 U.S.C.A. § 541.
[5] 39 STAT. 427 (1916), 39 U.S.C.A. § 538.
[6] 39 STAT. 428 (1916), 39 U.S.C.A. § 539.

is at stake than a simple statutory privilege of doing business with the Government. The interest of the plaintiff railroads is not a mere expectancy of continued patronage. It is a present interest stemming from substantial investments in cars and equipment. Such an interest may merit legal consideration even when the investment is made freely and with knowledge of a possible change of status that would impair its use.[7] If so, it is sufficient here, for the railroads did not acquire these facilities as merely useful or needed in obtaining Government business; they acquired the equipment because they were commanded to do so by law.

Nor can the contested action of the Postmaster General be viewed only as creating competition for the railroads. In the first place the air carriers and the railroads do not bid for the mail as free competitors. They transport it as agents of the United States,[8] subject to minute regulation by the Postmaster General. Furthermore, the Postmaster General did not simply finance or create new competition; he explicitly discontinued the use of certain railroad equipment. For example, in the record before us is a letter in which the Postal Transportation Service at San Francisco advised the Southern Pacific Company that certain apartments in various trains would be discontinued. This is a direct act which is part and parcel of the experimental program for transportation of three-cent mail by air. If the program is invalid for want of statutory authority the plaintiff railroads have been injured by a direct illegal

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[7] See, *e.g.*, Standard Airlines v. Civil Aeronautics Board, 85 U.S. App. D.C. 29, 177 F. 2d 18 (D.C. Cir. 1949); Civil Aeronautics Board v. American Air Transport, 91 U.S. App. D.C. 318, 201 F. 2d 189 (D.C. Cir. 1952) (certified to Supreme Court), *certificate dismissed*, 344 U.S. 4, 97 L. Ed. 4, 73 S. Ct. 2 (1952), *appeal decided*, 91 U.S. App. D.C. 323, 201 F. 2d 194 (D.C. Cir. 1952).

[8] Atchison, T. & S. F. Ry. v. United States, 225 U.S. 640, 56 L. Ed. 1236, 32 S. Ct. 702 (1912).

act. The situations presented in cases like *Alabama Power Co.* v. *Ickes, supra,* were wholly different, and such cases do not apply. We think the plaintiff railroads have standing in court to challenge the alleged illegal act.

We come, then, to the question whether the Postmaster General has authority to conduct the experimental carriage of three-cent mail by air. His general authority to arrange for mail transportation stems from a statute which provides: "The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper."[9] By a later enactment "air routes" were added to the definition of "post roads established by law".[10] More specific are the provisions of the Civil Aeronautics Act.[11] That Act requires the Postmaster General to tender mail to air carriers holding a certificate authorizing the transportation of mail by aircraft according to the needs of the Postal Service, and requires the carriers to transport such mail. It also provides that rates of compensation to air carriers for carrying the mail be fixed by the Civil Aeronautics Board.[12]

The position of the plaintiff railroads is quite simple. They say the foregoing provisions relate to so-called "air mail" and to no other mail. Another statute establishes the rate of postage on "domestic air mail" at six cents an ounce,[13] and "domestic air mail" is defined in the statute as "all mailable matter being transported as mail by air within the continental United States".[14] The rail-

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[9] Rev. Stat. 3965, 39 U.S.C.A. § 483.
[10] 52 Stat. 1027 (1938), 39 U.S.C.A. § 481.
[11] 52 Stat. 977 (1938), as amended, 49 U.S.C.A. § 401 *et seq.*
[12] 52 Stat. 998 (1938), as amended, 49 U.S.C.A. § 486.
[13] 62 Stat. 1261 (1948), 39 U.S.C.A. § 463a.
[14] 60 Stat. 1062 (1946), 39 U.S.C.A. § 462a.

roads therefore argue that "all mailable matter being transported as mail by air" must bear postage at the six-cent rate. These postage-rate provisions, say the railroads, are clear, without ambiguity, and must be given the effect their words require. They are in accord, say the railroads, with the distinction between ordinary surface mail and air mail which has consistently been recognized by legislative and executive authorities prior to the inauguration of the present experimental service.

In support of his authority the Postmaster General urges a number of propositions. He points to his general authority to provide for the carriage of mail on all post roads, including air routes, and to the provisions of the Civil Aeronautics Act to which we have referred. More specifically, he urges contemporaneous legislative approval of the experimental program manifested in committee reports [15] and the 1954 Post Office Appropriation Act.[16] Finally he cites an administrative distinction between air mail, as a special service receiving expedited handling and attention, and ordinary three-cent mail, which receives no special handling whether or not carried by air under this experiment. He claims support in a formal opinion of the Comptroller General [17] supporting the experimental program so long as this distinction is maintained.

The principal problem is whether the statutes fixing an air-mail postage rate and defining "domestic air mail" prohibit carriage by air of mail not bearing the special air-mail rate of postage. The railroads rely heavily upon the statutory definition of "domestic air mail". The complete section containing the definition is as follows:

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[15] *E.g.*, S. Rep. No. 1286, 83d Cong., 2d Sess. (1954).

[16] 68 Stat. 144.

[17] Letter of Aug. 12, 1953—B-116331—appearing in this record at page 288 and printed in the joint appendix at page 68.

> "As used in this Act, 'domestic air mail' shall embrace all mailable matter being transported as mail by air within the continental United States, within any Territory or possession of the United States, within any geographical area which is a protectorate of the United States, or between any of the aforesaid: *Provided,* That with respect to mail transported under authority of section 1 of the Act of October 14, 1940 (54 STAT. 1175; 39 U.S.C., 1940 edition, 488a), the postage rate of 5 cents for each ounce or fraction of an ounce shall be applicable only to mail of the first class, and for all other classes the rates shall be as prescribed by that Act."

The railroads reason, as we have said, that "all mailable matter being transported as mail by air" is "air mail" and the special postage is required to be paid on all matter thus transported. They conclude from those premises that mail not bearing the special postage cannot be transported by air. But we think the argument overlooks an important factor. Congress had, prior to the above-quoted definition, already defined "air mail" as being mail on which special air-mail postage has been prepaid. Under that definition "air mail" is not such matter as the Post Office transports by air but is matter upon which the sender has affixed special postage; the nature of the mail as air mail is fixed by the sender, not by the Postal Service. If that view is correct, the statutory definition of "domestic air mail" above quoted does not preclude the Post Office from transporting by air matter other than "air mail". It must, generally speaking, transport by air matter to which the special postage has been affixed, but it not required to demand the special postage for all matter which it transports by air.

An interesting problem in statutory construction is posed

by the railroads' argument in this respect. The several steps are long and complicated, and we have relegated the recital to an Appendix to this opinion. Our conclusion from the legislative history is that Congress in 1946 meant to use the words "air mail" in the sense it had already given those words and by adding "domestic" it intended merely to add a geographical description extending the continental postage rate to carriage of mail to the territories, possessions and protectorates of the United States. This is the plain, commonsense view. The only contrary consideration is that in 1946 Congress did not in words carry forward the 1925 and 1934 definitions but left them hanging without any practical application. In the absence of clear indication of a Congressional intent to discard the established definition, we think the view urged by the railroads is untenable.

Moreover, to accord "domestic air mail" the meaning urged by the railroads would give rise to serious statutory conflicts. Before 1946, for example, several statutes had been enacted expressly authorizing the Postmaster General to contract, in certain situations, for the carriage of "any or all classes of mail" by aircraft. One statute [18] authorized such contracts in emergencies caused by flood, fire, or calamitous visitation; another [19] granted similar authority to provide for air transportation over otherwise inaccessible or impracticable routes. If the subsequent definition of "domestic air mail" required all mail carried by air to bear air-mail postage, authority to contract for "any or all classes of mail" under these prior statutes was thereby terminated. Under that view of the definition the Postmaster General, whatever the emergency or the terrain, could contract only for mail bearing the special postage, since any mail carried by air under these

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[18] 52 STAT. 997 (1938), 49 U.S.C.A. § 485(k).

[19] 52 STAT. 219 (1938), as amended, 39 U.S.C.A. § 470.

contracts would be "domestic air mail" and would require the added postage. Congress in 1946 indicated no intention to nullify these prior statutes.

Other considerations support the foregoing view. The obvious purpose of imposing the higher rate of postage for "air mail" was to insure revenue proportionate to higher costs. Real air-mail service, for which the higher rate is charged, involves many priorities, and they are costly. The carriers must transport this mail on an imperative priority basis. Nothing in the record suggests that the mere means of transportation, air as compared to rail, would justify the surcharge. Indeed, so far as the record indicates, the variation in cost between carriage by rail and carriage by air on a non-priority, space-available basis is not substantial. We think the special surcharge for "domestic air mail" implies a special service. The Senate Committee Report of 1946[29] recited the disparity between the three-cent surface rate and the then eight-cent air rate, called that disparity a "penalty", and indicated the purpose of the five-cent-rate statute as follows:

> "Therefore, H. R. 5560 [which became the postage-rate statute] proposes to remove the penalty and put these two services, surface and air, on approximately equal footing—*the mailer to take his choice in accordance with the importance of his communications*." (Emphasis supplied.)

Under the present experimental program a person mailing an article with three cents postage does not receive any special service "in accordance with the importance of his communications". Indeed, while his mail may be carried by an air carrier, it may receive slower service than

[29] S. Rep. No. 1834, 79th Cong., 2d Sess.

if carried by rail, since such mail is handled by the air carriers on a basis of space when, as and if available.

Statutes relating specifically to the authority of the Postmaster General to provide for mail transportation are consistent with our conclusion. As we have noted, the Postmaster General is authorized to arrange for the transportation of mail on all post roads established by law, including air routes. Standing alone this general authorization might not be persuasive,[21] but the Civil Aeronautics Act, in requiring the Postmaster General to tender "mail"[22] to air carriers, does not limit that term to "air mail"; it provides generally that he shall tender "mail" to "the extent required by the Postal Service".

Quite important, so far as this specific program is concerned, is the fact that Congress has been fully cognizant of its inauguration and in the appropriation for the Post Office Department in 1954 inserted a proviso requiring reports to include "the total cost of the eliminated and replacement service for airline, truck, and railroad transportation."[23] The plaintiff railroads urge that this is not sufficient to manifest ratification and approval by the Congress and claim the cases cited by the Postmaster General on the point[24] are distinguishable. But we are unable to find any prohibition of the present experimental program, while we do find statutory provisions broad enough to encompass it within their terms. Under these circumstances

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[21] Beach v. United States, 226 U.S. 243, 257, 57 L. Ed. 205, 33 S. Ct. 20 (1912).

[22] "Mail" is defined in the Act as "United States mail and foreign-transit mail." 52 STAT. 979 (1938), 49 U.S.C.A. § 401(23). Thus in this statute the term "mail" has no special limitations.

[23] 68 STAT. 148.

[24] Brooks v. Dewar, 313 U.S. 354, 85 L. Ed. 1399, 61 S. Ct. 979 (1941); Fleming v. Mohawk Co., 331 U.S. 111, 91 L. Ed. 1375, 67 S. Ct. 1129 (1947); Wells v. Nickles, 104 U.S. 444, 26 L. Ed. 825 (1881); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 81 L. Ed. 659, 57 S. Ct. 478 (1937).

we think the indications of implied legislative approval are entitled to weight. In sum we conclude that the experimental program for carrying ordinary first-class mail by air is within the statutory authority of the Postmaster General and is authorized by law.

The judgment of the District Court will be vacated and the case remanded with instructions to grant defendant Postmaster General's motion for summary judgment.

Judgment vacated and case remanded.

BASTIAN, CIRCUIT JUDGE, concurring in the result: I agree with the holding of the court that the Postmaster General has the authority to conduct experimental carriage of three-cent mail by air. I have doubts, however, as to the standing of the railroads to sue.

APPENDIX

This Appendix is a study of the definition of "air mail" in connection with the prescription of postage rates.

In 1925 Congress enacted a short statute, 43 STAT. 805, five one-sentence sections, titled "Air Mail Act". That statute defined "air mail" thus: "That when used in this Act the term 'air mail' means first-class mail prepaid at the rates of postage herein prescribed." The rate was prescribed at ten cents an ounce. In the United States Code (1926) the "air mail" definition was codified as Section 462 of Title 39. It remains there today, with a change we shall mention in a moment. The postage rate provision was codified as Section 463 of the same Title.[1]

[1] In 1928 the rate was changed to 5 cents. 45 STAT. 594. In 1926, 44 STAT. 692, 1928, 45 STAT. 594, and 1930, 46 STAT. 259, the section of the 1925 Act relating to the contracting authority of the Postmaster General was amended and other sections added. In 1934, 48 STAT. 933, that section of the 1925 Act and the added sections were repealed. Those changes are immaterial here.

In 1934 Congress, without expressly repealing either the "air mail" definition or the postage rate section of the 1925 Act, enacted another definition of "air mail" and another postage rate provision. The new definition was substantially the same as the old. It read, Sec. 2(b)(1), 48 STAT. 933:

> "(b) When used in this Act—
>
> "(1) The term 'air mail' means mail of any class prepaid at the rate of postage prescribed in subsection (a) of this section."

The latter subsection was the postage rate provision. The codifiers (1940 edition) handled this Congressional action in mixed fashion. They treated the new postage provision as superseding the old provision and thus placed it as Section 463. But they included both definitions of "air mail", leaving the old as Section 462 and adding the new as Section 469. Moreover they made both definitions applicable to the postage rate section, Section 463; translating the statutory language they made each definition read "When used in sections 463 [etc.]"

In the Civil Aeronautics Act, 52 STAT. 1029 (1938), Congress repealed most of the provisions of the 1934 Act relating to air mail but left the rate and definition sections intact. In the Revenue Act of 1943, 58 STAT. 69, the postage rate was increased two cents. Thus in 1946 the rate on air mail stood at eight cents. The committees of the Congress were of opinion that the disparity between this "premium air-mail rate" and the surface rate of three cents was too great. S. REP. No. 1834, 79th Cong., 2d Sess. (1946). Also, a problem had arisen as to the rate to territories and possessions of the United States. The Senate Committee discussed these problems in its report. In doing so it used the term "air mail"

without definition, as though it were a known term, discussed the postage rate problem, and recommended an extension of the continental rate to the territories, etc.; but nowhere did it mention any intent to circumscribe or change the then existing powers of the Postmaster General. Thereupon Congress enacted another short statute, 60 STAT. 1062 (1946), three one-sentence sections, which prescribed the rate on domestic air mail at five cents (changed to six cents by a 1948 Act, 62 STAT. 1261) and defined domestic air mail as we have quoted it in the text of this opinion. But the draftsmen of this 1946 statute did not include a provision fitting the new provisions into existing law or making the new act amendatory of or supplementary to the old; they left the new provisions as a separate and independent piece of legislation.

The codifiers (1946 edition) at first treated the new postage section (fixing the rate on "domestic air mail") as superseding the old, putting it in as Section 463.[2] They left both of the definitions of "air mail" in the Code as they had theretofore been, Sections 462 and 469, and left both referring to the postage section, Section 463. They inserted the new definition of "domestic air mail" as a new section, Section 462a. Thus it is clear that as of that time, so far as the United States Code was concerned, the definition of "air mail" applied to the use of those two words in the phrase "domestic air mail". As we have already said, we think that was correct.

In 1948 Congress changed the law respecting post cards sent by air, setting that rate at four cents. 62 STAT. 1261. On all other matter Congress prescribed a six-cent rate. When the codifiers put this statute in the Code (Supp. II to 1946 Code), they did not treat it as superseding the old postage rate section, Section 463; they added it as a

[2] In their explanatory comments the codifiers said the new provision "amended" the old.

new section, Section 463a, and dropped Section 463 out of the Code. But they did not make a corresponding change in the definitions of "air mail". So Section 462 is made to apply to Sections 461 (the Short Title section), 462 (the definition itself), and 465 (having to do with rules and regulations). And the other definition, Section 469, is made to apply to Section 463 (which is not in the Code at all) and Section 469f (which relates to claims on account of annulled contracts). So the Code makes it appear that neither definition of "air mail" applies to the postage rate provision. Moreover the codifiers made the "air mail" definition in Section 462 read as meaning mail prepaid at the rates "prescribed in sections 461, 462 and 465 of this title." No postage rates are prescribed in any of those sections. And they made the definition in Section 469 read as meaning mail prepaid at the rate "prescribed in section 463 of this title." As we have pointed out, there was no Section 463 left in the Title. We find nothing in any statute or in any legislative history which justifies this change, if it is intended to be a change, in the statutes made in the course of codification.

The essence of the contention of the railroads on this point is that when Congress defined "domestic air mail" in 1946 it did not mean to use the term "air mail" as the term was already defined by statute but meant to redefine that term as well as to add the word "domestic". Nothing in the legislative history, so far as we can find, justifies that view. Our view on the point is as we have stated it in the text of this opinion.

APPENDIX C

Before Edgerton, Chief Judge, and Prettyman and Bastian, Circuit Judges

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in these cases be, and the same is hereby, vacated, and these cases be, and the same are hereby, remanded to the said District Court with instructions to grant defendant Postmaster General's motion for summary judgment.

Dated: December 12, 1955.

Per Circuit Judge Prettyman.

Separate opinion by Circuit Judge Bastian concurring in the result.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	9
Conclusion	24
Appendix	25

CITATIONS

Cases:	
Alabama Power Co. v. *Ickes*, 302 U. S. 464	23
Brooks v. *Dewar*, 313 U. S. 354	18
Fleming v. *Mohawk*, 331 U. S. 111	18
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139	18
Kansas City Power & Light Co. v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U. S. 884	23
Mitchell v. *United States*, 267 U. S. 341	18
Swayne & Hoyt v. *United States*, 300 U. S. 297	18
Tennessee Power Co. v. *T. V. A.*, 306 U. S. 118	23
Wells v. *Nickles*, 104 U. S. 444	18
Statutes:	
Act of June 23, 1938, 52 Stat. 1027, 39 U. S. C. 481	10, 25
Act of May 28, 1954, 68 Stat. 148	17
Air Mail Act of 1925, 43 Stat. 805	5
Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U. S. C. 401 *et seq.*:	
Sec. 401	12, 25
Sec. 405	25
Sec. 481	12
Sec. 485	11
62 Stat. 1261, 39 U. S. C. 463a	5
R. S. 3965, 39 U. S. C. 483	10, 12, 13, 25

382263—56——1

Page

Miscellaneous:
100 Cong. Rec. 2011–2012 17
16 F. R. 9568 5
H. R. 5234, 75th Cong., 1st Sess 12
H. Rep. No. 2278, 83rd Cong., 2d Sess 18
H. Rep. No. 2619, 83rd Cong., 2d Sess 18
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234, 4652, 75th Cong., 1st Sess. (1937) 12
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong., 3rd Sess. (1938) 12
Hearings before House Subcommittee on Post Office Appropriations on H. R. 7893, 83d Cong., 2d Sess. (1954) 15
Hearings on 1956 Treasury-Post Office Department Appropriations before House Subcommittee on Appropriations, 84th Cong., 1st Sess. (1955) 4, 5, 15, 20
Hearings before Senate Subcommittee on Interstate Commerce on S. 2, 1760, 75th Cong., 1st Sess. (1937) 12
Hearings before Senate Subcommittee on Interstate Commerce on S. 3659, 75th Cong., 3rd Sess. (1938) 12
Hearings before Senate Subcommittee on Post Office Appropriations on H. R. 7893, 83d Cong., 2d Sess. (1954) 15
S. 2, 75th Cong., 1st. Sess 12
S. 3760, 75th Cong., 3rd Sess 12
Sen. Rep. No. 1286, 83rd Cong., 2d Sess 16

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the district court denying petitioners' motion for a preliminary injunction (R. 70–76) are not reported. The opinion of the district court granting petitioners' motion for summary judgment in part (R. 2–15) is reported at 128 F. Supp. 266. The majority and concurring opinions in the court of appeals (Pet. 37–50) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1955 (Pet. 51). A petition for rehearing was denied on January 27, 1956. The petition for a writ of certiorari was filed on February 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether railroad companies may enjoin the Postmaster General from conducting an experimental program for the limited air carriage of three-cent mail normally carried by rail or other surface means of transportation, where the experiment (1) was necessitated by the railroads' continuing withdrawal from service of mail-carrying trains, (2) was undertaken for the additional purposes of enabling the Post Office Department to acquire valuable experience for overcoming sudden disruptions of communications in times of national emergency, and (3) was designed to obtain other data needed to determine whether air transportation may be cheaper as well as faster than surface transportation.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 25–26.

STATEMENT

Petitioners, five railroad companies, operate in California, Oregon, and Washington (R. 17). In October 1954, the Postmaster General announced that an experimental program for transportation of certain three-cent mail in air carrier excess cargo space would be instituted between various cities in those three states (R. 17, 48). The following month, petitioners filed this suit in the United States District Court for the District of Columbia to enjoin the Postmaster General from conducting the West Coast experiment (R. 15–19).

This experiment, like three others in the eastern United States, is an integral part of the Post Office Department's "plans for making the most efficient and economical use of all modern forms of transportation and for bringing the postal service abreast of recent far-reaching changes in the pattern of transportation" (R. 44). The experimental use of air carrier surplus cargo space for transportation of three-cent mail implements these general plans by serving two specific objectives:

> (1) The experiment will enable the Post Office Department to "gain valuable experience for effectively meeting sudden dis-

ruptions of communications in times of national emergency." [R. 45, 47.] [1]

(2) The experiment will furnish the data necessary to determine whether air carriage of three-cent mail will "provide the public with a more efficient and expeditious service at a cost comparable to or lower than the cost of surface transportation exclusively." [R. 45.]

One other important factor emphasized the need for the experimental program. The great bulk of rail-transported mail is carried, as petitioners concede, in passenger trains (R. 22; Pet. 6). But there has been a "continuing withdrawal [by the railroads] from service of passenger trains," and an ensuing "lack in many areas of adequate rail facilities" for mail carriage (R. 44). Thus, while there were over 19,000 trains used to transport domestic mail in 1925, only 5,000 trains were available in 1953 (R. 56). This continuing withdrawal and the accompanying "substantial deterioration of the mail service"

[1] In explaining the reasons for the experiment, the Postmaster General pointed out: "It is conceivable today that in a time of national emergency substantial areas could be rendered inactive through military means. Therefore, it was obvious to us that it was important that we get some experience in the handling of mail by air, which might be the only means we could use for an indefinite period of time under certain conditions. It was also highly desirable that the carriers themselves have that experience that is so necessary." Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., p. 51, Feb. 16, 1955.

have "in recent years [been] the postal service's most pressing problems" and have "compelled the Department to seek additional modes of transporting the mail" (R. 44, 45, 56). As explained by the Postmaster General to Congress, the experimental air carriage was inaugurated "because * * * the constantly reduced mail-carrying trains [made] it an absolute physical necessity to do something to continue to provide the service that we had enjoyed before, as well as to improve it." Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., p. 73, Feb. 16, 1955.

The nature of the service planned for air carriage of three-cent mail under the experimental program is entirely different from the traditional, high-priority air mail service for which a six-cent air mail postage is collected (R. 74).[2] The latter air mail service remains "the premium service offered by the Post Office Department" to

[2] The Post Office Department has provided the public with an air mail service since the advent of air transportation (Air Mail Act of 1925, 43 Stat. 805). Although not entitled to special delivery, the air mail service is the most expeditious mail service available and assures the user not only that his mail will receive the most rapid means of transportation, surface or air, but also that it will be given top priority treatment from the initial handling in the post office of origin to distribution at the post office of destination (see 16 F. R. 9568; JA 53–55). It is this air mail service for which the user pays a postage rate of six cents per ounce (62 Stat. 1261, 39 U. S. C. 463a).

provide expedited handling, transportation, and distribution on a strict "priority traffic" basis (R. 54). On the other hand, the three-cent letter, under the experimental program, does not receive the guaranteed high-priority, expedited service accorded air mail. Instead, it receives ordinary handling and distribution, as in the past, and is moved by air carriers only when they have sufficient empty space after all other traffic, including air mail, has been accommodated (R. 54–55). Thus, the sender who pays first class postage does not get six-cent or "real air mail service" (Pet. 45). His three-cent letter may or may not move by air, because the "air carrier is not required to carry the mail on which such postage has been paid but may do so voluntarily if he has cargo 'space available' on his plane after all other traffic is first accommodated" (R. 55, 81). Even if there is space and the three-cent letter starts to move by air, it may do so for only part of the distance the letter must travel (R. 55).

With respect to the experimental program on the West Coast, the Civil Aeronautics Board, on November 9, 1954, consistent with the special conditions prescribed for the movement of first class mail by aircraft on a non-priority, space-available basis, proposed a temporary rate of 19 cents per ton mile to be paid carriers for moving such mail (R. 52, Exhibit 16). This rate is "far below the lowest existing rate, 45 cents per

ton mile, for the usual top priority air mail service" (R. 49).[3]

Sixty-nine railroads, including the present petitioners, sought to intervene in the rate proceeding which led to the Board's order of November 9, 1954, alleging, *inter alia,* that the Postmaster General had no authority to tender three-cent mail for carriage by air and that, therefore, the Board should not fix rates for the experimental service (R. 52, Exhibit 16). The Board, rejecting the railroads' contention that "the Board has no authority to fix compensation for the non-obligatory transportation of mail on a space available basis," denied the railroads' motion to intervene for the purpose of fixing a temporary rate but granted them leave to intervene in the proceeding to determine a final rate[4] (R. 52, Exhibit 16; R. 74).

Petitioners did not attempt to appeal from the Board's action, but filed the instant suit to enjoin the Postmaster General from conducting the West Coast experiment (R. 15–19). The district court, finding the facts summarized above, concluded that the plaintiff railroads "are objecting,

[3] Comparable rates, ranging from 18–20 cents per ton-mile, were fixed by the Board for the East Coast experiment (R. 49).

[4] In addition, the Board, while not passing directly on the question, indicated that it was persuaded as to the Postmaster General's legal authority to conduct the experiment (R. 52, Exhibit 16).

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in effect, to the fact that the Postmaster General is dealing with their competitors instead of with them. In the circumstances their standing to sue is questionable" (R. 75). In addition, the district court, recognizing that the experimental service is "clearly distinct from the traditional, high priority" six-cent air mail service, expressed "grave doubt as to whether" mail subject to the experiment constitutes "air mail" in the sense used in the statutes requiring six cents postage (R. 74, 75). Accordingly, the district court denied petitioners' motion for a preliminary injunction (R. 76).

Both sides then moved for summary judgment (R. 76, 82). Another division of the district court denied the Postmaster General's motion for summary judgment and the railroads' motion for a permanent injunction, but granted, in part, the railroads' motion for summary judgment, ruling "that the prolonged experimental transportation of first-class mail by air on the West Coast is beyond the authority of the Postmaster General" (R. 1).

On cross appeals, the court of appeals ordered the judgment of the district court vacated and remanded the case with instructions to grant the Postmaster General's motion for summary judgment (Pet. 47). The court ruled that while petitioners had standing to challenge the legality of the experiment, the Postmaster General had statutory authority to conduct it (Pet. 41, 47).

Judge Bastian concurred in the result and in the court's holding that the Postmaster General has authority to conduct the experiment. In addition, he expresed his doubts "as to the standing of the railroads to sue" (Pet. 47).

ARGUMENT

Petitioners, in seeking review of the decision below, urge two reasons. Their basic contention is that the court below erred in holding that the statutory provisions which vest authority in the Postmaster General over the administration of the postal service are broad enough to authorize the experimental program (Pet. 9, 46). Additionally, petitioners contend that the diversion of mail from rail to air under the experimental program has resulted in "substantial revenue losses to the railroads," and that this may impair passenger train service, which may, in turn, become inadequate for the movement of troops in time of national emergency (Pet. 5, 6–7). Neither contention, as we show below, has merit. Moreover, established rulings of this Court foreclose petitioners' standing to sue and thus furnish an independent basis for the denial of their claims. We accordingly submit that further review by this Court is unnecessary.

1. The holding below that the Postmaster General has statutory authority to conduct the experimental carriage of three-cent mail by air is firmly supported by the unambiguous language

of R. S. 3965, 39 U. S. C. 483, *infra*, p. 25. That statute declares:

> The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

No broader or more emphatic language could have been employed in vesting complete discretion in the Postmaster General to use any "post roads" he "may think proper" for the transmission of mail. And, in apparent anticipation of attempts, like petitioners', to restrict the comprehensive scope of the Postmaster General's authority, Congress, in 1938, expressly redefined "post roads" for the sole purpose of expanding that term to include "all air routes which are now or hereafter may be in operation." Act of June 23, 1938, 52 Stat. 1027, 39 U. S. C. 481. Congress thus made clear the Postmaster General's plenary authority to use any means of transportation for carriage of the mail, including the airlines, whenever "he, having due regard to productiveness and other circumstances, may think [it] proper."

The Postmaster General's determination to institute the experimental air carriage program leaves no room for doubt that he conformed to the statutory criteria and gave "due regard to productiveness and other circumstances." As already noted, the need for the experiment was

in large part caused by the railroads' continuing withdrawal of mail-carrying trains from service. To avoid further deterioration of postal service, it became "an absolute physical necessity" to turn to other modes of transportation. See *supra*, p. 5. Furthermore, the Postmaster General's decision was based on the need to obtain data to determine whether air carriage of three-cent mail might be used to provide the public with more efficient and expeditious deliveries at a cost comparable to or lower than that of surface transportation exclusively. Finally, the decision took into account another very significant circumstance—the need for gaining experience to overcome sudden disruptions of surface and other communications in time of national emergency. In view of the Postmaster General's consideration of these circumstances, his decision to conduct the experiment was plainly a proper exercise of the discretion vested in him by the broad language of R. S. 3965 and the 1938 amendment.

Those statutory provisions, standing alone, thus furnish abundant authority for the experiment. Further confirmation is provided by the Civil Aeronautics Act. That Act, without any limitation, authorizes the Postmaster General to tender all mail to certificated air carriers "to the extent required by the Postal Service." 52 Stat. 994, 49 U. S. C. 485 (g). And the same Act authorizes the air carriers to transport such "mail whenever required by the Postmaster General." 52 Stat.

987, 49 U. S. C. 481 (m).[5] Thus, under the Civil Aeronautics Act, the Postmaster General is authorized to tender any mail for movement by air—and the airlines are authorized to carry such mail—to the extent required by the postal service. Here, as already shown, the Postmaster General has determined that the needs of the service require the experimental air carriage of three-cent mail.

Notwithstanding the broad authority vested in the Postmaster General by R. S. 3965, the 1938 amendment, and the Civil Aeronautics Act, petitioners contend that the Postmaster General may

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[5] The word "mail" in these two sections of the Civil Aeronautics Act embraces all classes of mail and not "six-cent" air mail alone since the word is defined as "United States mail and foreign-transit mail." 52 Stat. 979, 49 U. S. C. 401 (23). The legislative history shows that prior drafts had limited the term "mail" to mail prepaid at rates of postage for air mail, but this provision was changed to eliminate that restriction. H. R. 5234, 75th Cong., 1st Sess., and S. 2, 75th Cong., 1st Sess., considered in March and April 1937, contained the limited definition. In 1938, S. 3760, 75th Cong., 3d Sess., was drafted; it defined mail in a broad way, not limited to surcharged mail. Other bills thereafter used this broad definition, which was later incorporated into the Act. Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234, 4652, 75th Cong., 1st Sess., p. 2 (1937); Hearings before Senate Subcommittee on Interstate Commerce on S. 2, 1760, 75th Cong., 1st Sess., pp. 9, 21 (1937); Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong., 3d Sess., p. 4 (1938); Hearings before Senate Subcommittee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. (1938).

tender for air carriage only mail bearing a six-cent stamp. The short answer to this contention is that no such limitation appears in R. S. 3965, the 1938 amendment, or the Civil Aeronautics Act. The language of those provisions clearly includes air carriage of all mail, whether a three or six-cent stamp is affixed. It is true, as petitioners argue, that the rate of postage on domestic air mail is six cents an ounce. 39 U. S. C. 463a. But that rate simply means that the Postmaster General may not charge a private citizen more than six cents on mail earmarked by the private citizen for air transportation. It certainly does not mean that where three-cent mail is tendered by the private citizen and, therefore, not earmarked by him for air transportation, the Postmaster General is precluded from using air transportation if it should be available and is no more costly to the postal service than would be train transportation.

Furthermore, petitioners' argument overlooks the purpose of the six-cent rate. As noted by the court below:

> * * * The obvious purpose of imposing the higher rate of postage for "air mail" was to insure revenue proportionate to higher costs. Real air-mail service, for which the higher rate is charged, involves many priorities, and they are costly. The carriers must transport this mail on an imperative priority basis. Nothing in the

> record suggests that the mere means of transportation, air as compared to rail, would justify the surcharge. Indeed, so far as the record indicates, the variation in cost between carriage by rail and carriage by air on a non-priority, space-available basis is not substantial. We think the special surcharge for "domestic air mail" implies a special service. * * * [Pet. 45.]

The record further establishes that the three-cent mail carried under the experimental program does not get this "special" or guaranteed high priority service. Instead, it receives ordinary handling and distribution and is moved by air carriers only when they have sufficient space (*supra,* p. 6). The six-cent mail rate, therefore, has no bearing on the experimental program involved in this case and in no way detracts from the Postmaster General's broad statutory authority to conduct the program.

Congressional approval of the program also confirms the view that it is authorized under existing statutes. As pointed out by the court of appeals, the experimental program has been approved by Congress, which has been kept fully advised of the program since its inauguration (Pet. 46). During the hearings on the appropriation act for the Post Office Department for the fiscal year ending June 30, 1955, the Post Office Department informed the House and Senate Committees on Appropriations concerning the

experimental mail service.[6] Upon receiving this information the Committees, far from limiting the program or questioning its legality under existing statutes, showed great interest in its continued operation and expansion. The Senate Committee stated:

THREE-CENT AIRMAIL

> The committee has been informed by the Post Office Department that the transportation of 3-cent mail by air between Washington and Chicago; New York and Chicago and certain points in the South is being handled at no greater cost than surface transportation. The opinion rendered

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[6] At the hearings before the Senate Committee on Appropriations, the Postmaster General made the following statement:

"Mr. SUMMERFIELD. * * * you already know about the experiment in the carrying of regular 3-cent mail by air. More than 2½ million letters of regular mail are flown every day on planes traveling between New York and Chicago and between Washington and Chicago, and as a result, service is expedited by many hours. When we are satisfied that this experiment is successful from the point of view of both cost and service, we shall extend it."

Hearings before the Senate Subcommittee on Post Office Appropriations on H. R. 7893, 83d Cong., 2d Sess., pp. 25–26 (1954). See also Hearings before the House Subcommittee on Post Office Appropriations on H. R. 7893, 83d Cong., 2d Sess., pp. 6, 40, 95, 253 (1954).

This program was again fully discussed at the Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., pp. 50–55, 65–66, 69, 72–74, 160, 168–169 (1955).

by the Comptroller General with respect to this experimental phase of mail transportation was largely centered around transportation at no greater cost and no degree of loss in the regular 6-cent airmail field. *The committee respectfully requests the Post Office Department to render a report to this committee, not later than 60 days after the passage of this act and thereafter at quarterly intervals, which will show the full and complete cost of transporting 3-cent mail by air, including clerical and ground costs, as well as the comparative cost of surface transportation between these same points. The report shall also contain the Postmaster General's observations and recommendations with respect to the extent of expansion feasible in the carriage of 3-cent mail by air.*

The committee has placed a provision in the bill, which will require the Post Office Department to submit quarterly reports on the major changes in the postal transportation field. [Sen. Rep. No. 1286, 83d Cong., 2d Sess., 5 (1954). Emphasis added.]

When the Post Office appropriation bill was considered on the floor of the House, Mr. Canfield, Chairman of the House Committee on Post Office Appropriations, discussed the Postmaster General's program for improving the postal service. The program for carrying three-cent mail by air was specifically approved as one of the far-reaching steps taken to improve the postal

service and one which the "committee has wanted done in the post office for many years." Mr. Canfield stated:

> Last year * * * our committee requested and received the wholehearted support of the House in giving the Postmaster General the *funds* and *flexibility* that he asked in order to permit him to carry out his program to improve the service and * * * reduce the postal deficit. * * * I am happy to tell you that he has kept his promises. * * * Ninth. All means of transportation are being used as *flexibly* as possible to give patrons better service with less cost to the Department. *The carrying of regular 3-cent mail by air is under experimentation.* * * * This is a great program of reorganization and *it is exactly what our committee has wanted done in the post office for many years.* [100 Cong. Rec. 2011–2012 (February 18, 1954). Emphasis added.]

In enacting the transportation appropriation for the Post Office Department, Congress inserted a proviso that the—

> * * * Post Office Department *shall* report not less than once every three months to the Committees on Appropriations of the Senate and House of Representatives all substantial transportation changes, such report to include the *total cost of the eliminated and replacement service for airline, truck, and railroad transportation.* [Act of May 28, 1954, 68 Stat. 148 (Public Law

374, 83d Cong., 2d Sess.). Emphasis added.]

This is the provision referred to in Senate Report No. 1286, which was inserted by the Senate Committee. This provision again expressly recognizes the program and constitutes additional congressional ratification of it. The Postmaster General has filed and will continue to file reports concerning the program.[1]

Under long-settled authority, appropriation of funds in these circumstances manifests congressional approval and provides confirmation of the Postmaster General's authority to conduct the program under existing statutes. *Fleming* v. *Mohawk*, 331 U. S. 111; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 147; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 301; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Wells* v. *Nickles*, 104 U. S. 444, 447.

2. Petitioners' suggestion that this case is of pressing importance and thus warrants review is predicated principally on the allegation that the experimental program is detrimental to the "financial well-being" of the railroads because of the "substantial revenue losses to the railroads"

[1] The Committee on Post Office and Civil Service of the House of Representatives has also specifically recognized the significance of the present program. H. Rep. No. 2278, 83d Cong., 2d Sess. (1954); H. Rep. No. 2619, 83d Cong., 2d Sess. (1954).

already caused by the program (Pet. 5). Even if this allegation had factual support, we seriously doubt that it would confer standing to maintain the instant suit. *Infra*, p. 23. In any event, the record establishes that the amount of mail diverted under the Postmaster General's experimental program "from railway common carriers to air facilities is relatively small in relation to the total volume of mail being transported by rail" (R. 62).

Thus, the estimate by the five petitioners that they will lose $850,000 annually as a result of the program (Pet. 6) represents "approximately 1.23 per cent of the total mail revenues of such carriers amounting to approximately $64,800,000 based on mail revenues for the calendar year 1953" (R. 63). Moreover, when compared with the total revenues of the five petitioners for 1953, the estimated loss resulting from the diversion of mail under the program "would amount to approximately four-hundredths of one per cent" of the total 1953 revenues (R. 63).

Even when viewed on a nationwide basis, the estimated annual loss of $2,000,000 for all rail carriers (Pet. 5) amounts to less than one per cent of the total revenues received by the railroads for carrying mail. The colloquy between Congressman Passman and the Postmaster General in the hearings on the 1956 appropriations highlights this factor:

Mr. PASSMAN. Has the use of the airlift for first-class mail had any appreciable effect on airmail revenues?

Mr. SUMMERFIELD. No; it has not had any appreciable effect on the revenue from regular airmail.

* * * * *

Mr. PASSMAN. Would it be possible for you to furnish for the record the amount of money paid railroads on an annual basis for moving mail?

Mr. SUMMERFIELD. Yes. I have those figures with me—$318 million was paid to the railroads in 1954.

Mr. PASSMAN. And what did you pay for the airlift for the same period?

Mr. SUMMERFIELD. Approximately $2 million.

Mr. PASSMAN. On a percentage basis, what percentage of the amount paid to the railroads is going to the airlift?

Mr. SUMMERFIELD. Eight-tenths of 1 percent.

* * * * *

Mr. PASSMAN. I am wondering why the railroads became so exercised over it when the amount you are paying for this superb airlift service is so small percentagewise. [Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., p. 73, Feb. 16, 1955.

In light of these relatively minor rail-mail revenue reductions, there would seem to be no

basis for petitioners' fears that the program will force mail-carrying passenger trains out of service to such an extent that our national defense will be jeopardized. Indeed, to the extent that the record reveals any potential danger to the national defense, it shows that the discontinuance—rather than the prolongation—of the experimental program will adversely affect defense measures. For, as already noted, one of the chief reasons for the experimental program was to gain vital experience for overcoming sudden disruption of surface communication in time of national emergency (R. 45; *supra,* p. 4, note 1). Interference with the progress of the experiment would, of course, make that experience unavailable.

Moreover, the record shows that a sharp reduction in passenger service had developed before the institution of the experimental program. The experimental operation itself resulted directly from the inadequacies of rail service (*supra,* p. 4). In 1925, there were 19,404 trains used to transport the mails (R. 56). By 1953, when the Department found it necessary to make use of the airlines to carry three-cent mail on an experimental basis, the number of trains available had dropped to approximately 5,000 (R. 56). It was this "substantial decline" which "compelled the [Post Office] Department to seek additional modes of transporting the mail" (R. 56).

Petitioners further assert that they must maintain in stand-by readiness all of the facilities and services that may be required to move the first-class mail now being carried by the airlines (Pet. 6). But here, too, the record does not substantiate the assertion. To the contrary, the record shows that the Post Office Department

> * * * neither requires the railroads to maintain or to establish passenger trains solely for the transportation of United States mail, nor requires the railroads to operate passenger trains on schedules established particularly for the transportation of United States mails. Instead, the Department limits its requirements for transportation insofar as train schedules are concerned to the transit time maintained by railway common carriers for their general transportation business in connection with their published schedules. Consistent with such postal requirements and the other primary services performed by railway common carriers, the establishment of passenger trains and their operating schedules are primarily accommodated to the requirements of their passenger services. [R. 57.]

Moreover, the Post Office Department's requirements in connection with the transportation of United States mail by railroad in no way prevent the rail carriers from "diverting any railway post office equipment formerly used to provide the services which have been discontinued on the

West Coast to other railway post office lines where there is a need for reasonably modern and adequate railway post office equipment or from converting such equipment to other rail purposes" (R. 65).

3. In addition to the correctness of the holding below on the merits (Point 1) and the lack of factual support for petitioners' attempted showing of importance sufficient to warrant review (Point 2), there is a third and independent reason militating against the grant of certiorari. Petitioners, we believe, lack standing to sue.

Fundamentally, what is involved here, as noted by the district judge in denying petitioners' motion for a preliminary injunction, is an objection by the railroads "to the fact that the Postmaster General is dealing with their competitors instead of with them" (R. 75). This Court has consistently ruled that similar claims are insufficient to give plaintiff competitors standing to sue. See, *e. g., Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118; see, also, *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884, and Judge Bastian's concurring opinion in the instant case, Pet. 47. Under these consistent rulings, the investments made by the railroads in cars and equipment—noted by the majority decision below—give the railroads no more standing than did the investments made by the power companies in the cited cases.

And those cases make it equally plain that the railroads have no more standing to sue here than did the pony express, stagecoach, and canal-boat operators, when they were supplanted by the railroads in the carriage of mail.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

1. R. S. 3965, 39 U. S. C. 483, provides:

> § 483. *Provisions for carrying the mail.* The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

2. The Amendatory Act of June 23, 1938, provides in pertinent part (52 Stat. 1027):

> SEC. 1107. (a) Section 3964 [39 U. S. C. 481] of the Revised Statutes is hereby amended by adding "and all air routes", after the words "or parts of railroads".

3. The Civil Aeronautics Act provides in pertinent part:

(a) Section 405 (g), 49 U. S. C. 485 (g):

> From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for tranportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

(b) Section 401 (m), 49 U. S. C. 481 (m):

> Whenever so authorized by its certificate, any air carrier shall provide necessary and

adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The response serves to highlight the inadequacies of the opinion of the Court of Appeals and the difficulties in finding legal support for the transportation of three-cent mail by air. Respondent, though seeking to sustain the decision below, virtually abandons defense of the Court of Appeals' opinion. Instead, respondent relies primarily on the Post Roads Act, 39 U.S.C. 483, and Congressional ratification. The Court of Appeals could not accept the ratification argument (Petition, Appendix B, pp. 46-47). It was unwilling to rest its opinion on the Post Roads Act, stating that: "Standing alone this general authorization [of the

Post Roads Act] might not be persuasive." (*Id.*, at p. 46.) Respondent also contends that the two lower courts erred in deciding that petitioners have standing to sue and that, regardless of the merits, the petition should be denied on this independent ground.

Beach v. *United States*, 226 U.S. 243, 257, held that the Post Roads Act "is one of the sections that prescribe the general duties of the Postmaster-General, and cannot be fairly treated as authority for making the alleged contract of purchase" of pneumatic-tube devices for the transportation of mail. Nor can it be "fairly treated as authority" for transporting three-cent mail by air. Despite the fact that that statute has been in effect at least since 1872, 17 Stat. 309, the Postmaster General has found it necessary to request and the Congress to enact numerous statutes expressly authorizing air transportation of mail, as is set forth in the petition. Respondent admitted, before the Court of Appeals, that the Postmaster General had no authority to transport three-cent mail by air between 1934 and 1938 although the Post Roads Act was then in effect. (See Petition, p. 14.) We have shown in the petition that the enactment of the Civil Aeronautics Act in 1938 was not intended to confer this authority on the Postmaster General, and has never been thought to have done so by the Congress, or by the Post Office Department until the experimental programs were inaugurated. Respondent does not squarely rely on the Civil Aeronautics Act as conferring such authority, but merely finds "further confirmation" in that Act. Furthermore, the Post Roads and Civil Aeronautics Acts must yield to the express prohibition against the transportation of three-cent mail by air in the subsequently enacted 1946 Act, even if as an original matter they would have provided authority for the experimental programs. Respondent does not undertake to explain why the Court should disregard the plain language of that Act pre-

scribing that "the rate of postage on all" "mailable matter being transported as mail by air" "shall . . . be six cents . . ."

A few Congressmen indicated their knowledge or approval of the transportation of three-cent mail by air, but without reference to the legal problem involved. Others, including the Chairman of the Senate Committee on Post Offices and Post Roads, expressed strong objections to the program.[1] At no time, however, was any action taken by the entire Congress with knowledge that approval of the transportation of three-cent mail by air was in question. As stated by the District Court (J. A. 10): "One has to know the function of the appropriation committee and the

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[1] The Post Office and Civil Service Committees are responsible for substantive legislation involving the Post Office Department. Senator Johnston, Chairman of the Senate Post Office and Civil Service Committee, stated before the Subcommittee of the Senate Committee on Appropriations considering the Post Office Department appropriations for fiscal 1956 that:

> "In my judgment, the Postmaster General has no authority to transport first-class mail by air even on an experimental basis . . . In his previous testimony the Postmaster General . . . has given no indication of when he proposes to suspend his so-called experiment. I wish to make it clear that in my judgment the experiment has already been unduly prolonged.
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> "I do not want to get into a discussion of the subject of flying first-class mail before the Appropriations Committee, as I do not think it would be appropriate, but I do want to bring to your attention the fact that there are serious questions of policy involved in any determination to provide air transportation for first-class mail that go far beyond the jurisdiction and responsibilities of the Appropriations Committee and which should be the subject of most careful study by my committee before any legislative action is considered." Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the Senate Committee on Appropriations, 84th Cong., 1st Sess., pp. 58-60.

The appropriations were adopted in the Senate without objection by Senator Johnston or any other member of the Post Office and Civil Service Committee, 101 Cong. Rec. 2688, which could hardly have been the case if ratification of the operations in question here were understood to be involved.

means by which our Congress operates to appreciate that" respondent's suggestion of ratification from a few scattered references to the program in Congressional reports and hearing "is not a tenable argument." This is particularly true where, as here, Congressional ratification would involve a repeal of an express statutory prohibition. At the very least, this Court should have the benefit of full briefs and oral argument before rejecting the conclusions of the two lower courts on this point.

Both the District Court (J.A. 13-14) and the Court of Appeals (Petition, Appendix B, pp. 39-41) held that petitioners have standing to sue under established common-law principles. We believe that those holdings are correct. Certainly, they are not so clearly wrong that this Court can decide the issue of standing adversely to petitioners without the benefit of full briefing and oral argument by the parties.

The agency action contested in this case does not merely involve the financing or creation of new competition, such as was involved in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, and similar cases. The plaintiffs in those cases were not regulated by the United States and the contested action did not interfere with or affect any obligations imposed upon them by the Federal Government. Petitioners, on the other hand, are obligated to transport mail tendered to them by the Postmaster General and to make substantial investments in special equipment for handling and transporting such mail. 39 U.S.C. 537, 538, 539, 541, 541-1, and 563. They are dependent upon mail pay to compensate them for these required investments and services. 39 U.S.C. 541; *United States* v. *New York C. R. Co.*, 279 U.S. 73, 78. Respondent, in an order (J.A 30-31) that was "part and parcel of the experimental program for transportation of three-cent mail

by air" (Petition, Appendix B, p. 40), expressly discontinued use of certain of the special equipment which petitioners were compelled to provide.

Thus, as the Court of Appeals found, if petitioners are correct on the merits they "have been injured by a direct, illegal act." Clearly the "legal wrong" is more evident here than in *Frost* v. *Corporation Commission*, 278 U.S. 515, where the holder of a non-exclusive franchise was found to have standing to complain of the unauthorized creation of competition, or in *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510, 535-536, and *Truax* v. *Raich*, 239 U.S. 33, where unlawful interferences with valuable business relationships were deemed sufficient to found standing. See, also, *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 154; *Parker* v. *Fleming*, 329 U.S. 531.

Furthermore, petitioners have standing to sue under the Administrative Procedure Act. Section 10(a) of that Act, 5 U.S.C. 1009(a), provides that:

> "Any person suffering legal wrong because of any agency action, *or adversely affected or aggrieved by such action within the meaning of any relevant statute*, shall be entitled to judicial review thereof." (Emphasis supplied.)

This provision clearly was intended to broaden the category of persons who have standing to seek review of agency action beyond that category of persons permitted standing by common-law principles. Otherwise, the phrase "suffering legal wrong" would have been sufficient and the remainder of the provision would be surplusage. The legislative history of the Act indicates that the phrase "adversely affected or aggrieved" was intended to be given the construction that similar phraseology had received in *Commission* v. *Sanders Radio Station*, 309 U.S. 470, and like

cases.[2] Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 276, 310-311. The *Sanders* case held that a competitor of a person granted a broadcasting license had standing to seek review of the grant, under a statute providing for judicial review at the behest of a person "adversely affected," even though he was not legally wronged by the agency action. Since the plaintiff was adversely affected in fact by the increased competition resulting from the agency action, he had standing to sue under the statutory standard.[3]

Section 10(a) of the Administrative Procedure Act, which is applicable to "any agency action" not by statute made final or committed to unreviewable agency discretion, must be read into all federal statutes providing for "agency action." Cf. *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, 51; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33. Respondent's regulations providing for the transportation of three-cent mail by air (J.A. 52-53) prescribe "facilities" and "service" for the carriage of mail, and thus constitute "agency action" as that term is defined in the Administrative Procedure Act. 5 U.S.C. 1001(c) and (g). The mail revenues of petitioners have been substantially reduced. Petitioners have been compelled to discontinue the use of certain special mail-transportation equipment, and their competitors have been aided by this agency action. Hence, they have been adversely affected in fact by the illegal action

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[2] E.g., *Scripps-Howard Radio* v. *Comm'n,* 316 U.S. 4; *Alton R. Co.* v. *United States,* 315 U.S. 15, 19; *Western Pac. Cal. R. Co.* v. *Southern P. Co.,* 284 U.S. 47, 51-52; *Chapman* v. *Federal Power Commission,* 345 U.S. 153; *National Coal Ass'n* v. *Federal Power Commission,* 191 F. 2d 462 (C.A.D.C.); *Seaboard and Western Air Lines* v. *C.A.B.,* 181 F. 2d 515 (C.A.D.C.); *Associated Industries* v. *Ickes,* 134 F. 2d 694 (C.A.2), vacated on other grounds, 320 U.S. 707; *Land O'Lakes Creameries* v. *McNutt,* 132 F.2d 653 (C.A. 8).

[3] One purpose of this broadening of the category of persons having standing to seek review of agency action was to assure judicial review in situations like that involved in *Perkins* v. *Lukens Steel Co., supra.* Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 368.

of respondent and are "adversely affected and aggrieved within the meaning of" the postal laws which are the "relevant statutes" governing the agency action in this case.

The District Court agreed that petitioners have standing under the Administrative Procedure Act (J.A. 13-14).[4] The Court of Appeals did not find it necessary to consider the matter since it found standing on other grounds. That court has stated elsewhere, however, that it "would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption." *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 933 (C.A. D.C.).[5] The exact effect of the Administrative Procedure Act on standing to seek review of illegal administrative action is still to be authoritatively determined.[6] The issue is of great importance because of the wide application of the Act. Decision of the issue requires careful consideration of several interrelated statutory provisions and extensive legislative

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[4] See, also, *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 349 (D. D.C.).

[5] In our view, some of the observations in the *Kansas City* case regarding the effect of the Administrative Procedure Act on standing are too restrictive. However, the circumstances of that case differ radically from those involved here.

[6] The Government has persistently urged a narrow reading of Section 10 of the Administrative Procedure Act. This Court, on the other hand, has emphasized that section 10 is to be given a "hospitable interpretation" in view of the Congressional purpose "to remove obstacles to judicial review of agency action." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51; *Heikkila* v. *Barber*, 345 U.S. 229, 232. It has never accepted the view that section 10 merely codified existing law. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474; cf., *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. The question of how far Section 10 has extended the doctrine of "standing" where unauthorized agency action has in fact adversely affected a petitioner remains an open one. The Government asserts in this connection as it did with reference to the other provisions of Section 10 that the Congress intended merely a codification of existing law. This Court's reading of the other provisions suggests that the Congress was aiming at correcting, rather than confirming, an existing situation.

history. This decision should not be made without the benefit of full briefing and oral argument by the parties.

Respectfully submitted,

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